Supreme Court, U.S.
FILED

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OFFICE OF

No. 03- ____

In the Supreme Court of the United States

JAMES L. HAUGEN,

Petitioner,

v.

HENRY COUNTY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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Pro Se

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QUESTIONS PRESENTED

1. Did the Supreme Court of Georgia deny Petitioner the right of due process by construing statutes with erroneous, omitted, and incomplete statutory language?

2. Did the Supreme Court of Georgia deny Petitioner the right of due process by replacing a statutory definition with a non-statutory definition sua sponte while overlooking the existing alternative definition provided by the General Assembly?

3. Did the Supreme Court of Georgia deny Petitioner the right of due process by addressing an abandoned issue and not the actual controversies?

4. As a result of the preceding defects of statutory construction, did the Supreme Court of Georgia impermissibly usurp the General Assembly's inherent taxation powers and violate the separation of powers guaranteed by the Georgia Constitution?

5. Has the Supreme Court of Georgia impaired the fairness, integrity, or public reputation of judicial proceedings by basing its Opinion on the preceding defects of statutory construction?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is James L. Haugen, a citizen, resident, and taxpayer of Henry County, Georgia.

Respondents are the Board of Commissioners of Henry County, Georgia, the duly elected and qualified governing body of Henry County, Georgia; Henry County, a political subdivision of the State of Georgia, and Leland Maddox, Warren Holder, Gary Freedman, Jason Harper, Gerry Adams, and Lee Holman, each of whom stand individually and as a member of the Board.

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The published opinion of the Supreme Court of Georgia is dated March 1, 2004, and the majority and dissenting opinions are produced herein as Appendixes B and C, respectively.[1] The unpublished judgment of the superior court dated March 31, 2003 is reproduced in Appendix D.

STATEMENT OF JURISDICTION

This petition seeks to have reviewed in the 4-3 decision of Division 2 of the judgment entered on March 1, 2004[2] and the 4-3 decision on April 14, 2004 denying Petitioner's timely Motion for Reconsideration. A copy of the Court's denial is reproduced in Appendix A.

This court has certiorari jurisdiction over this case under 28 U.S.C. § 1257.[3]

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

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[1] The opinion is published as Haugen v. Henry County, No. A03A1444, 2004 WL 370216, 594 S.E.2d 324 (Ga. 2004).

[2] The Supreme Court of Georgia unanimously held for Petitioner in Division 1.

[3] The Supreme Court of Georgia is the highest court of the State of Georgia in which a decision could be had.

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GA. CONST. Art. I, § I, ¶ I provides:

No person shall be deprived of life, liberty, or property except by due process of law.

GA. CONST. Art. I, § II, ¶ III provides:

The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

GA. CONST. Art. III, § I, ¶ I provides:

The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.

GA. CONST. Art. VII, § III, ¶ I(a) provides:

Except as otherwise provided in this Constitution, the power of taxation over the whole state may be exercised for any purpose authorized by law. . . .

STATEMENT OF THE CASE

In 1996, voters in Henry County, Georgia approved the imposition of a sales tax in a referendum called for by Respondents in Resolution No. 96-14 (hereinafter, "Resolution"). The tax, commonly known as the Special

Purposes Local Option Sales Tax (hereinafter, "SPLOST"), is authorized by OCGA § 48-8-110 et seq. The tax intended to raise a maximum amount of $60 million for the purposes of road, streets, and bridge construction projects (hereinafter, "roads purposes") and specific capital outlay projects.

The tax received net proceeds in the amount of $71.8 million which is $11.8 million in excess of the maximum amount. Interest had accrued in the amount of $4.6 million through May 30, 2002, and the total amount in the SPLOST budget was $76.4 million. Approximately $60 million had been spent and/or encumbered from funds in the SPLOST account on October 22, 2002, approximately three months after the instant case was initiated. The issue of this instant case involves Respondents' use of the $11.8 million of "excess proceeds" only and not the accrued interest.

There are two measurements of "excess proceeds" defined in OCGA § 48-8-121(g)(1)(B): the "maximum cost measurement" and the "actual cost measurement." Under the maximum cost measurement, "excess proceeds" exist when the county receives net proceeds "in excess of the maximum cost of the project or projects stated in the resolution. . . ." OCGA § 48-8-121(g)(1)(B). Under the actual cost measurement, "excess proceeds" exist when the county receives net proceeds "in excess of the actual cost of such project or projects." "Excess proceeds" currently exist under the maximum cost measurement because Respondents have received $11.8 million in excess of the maximum cost of $60 million. "Excess proceeds" will not exist under the actual cost measurement because the actual cost of projects would consume all of the net proceeds according to affidavits filed by Respondents.

In a mandamus action, Petitioner sought (and still seeks) to compel Respondents to use the "excess proceeds" pursuant to two separate provisions of OCGA § 48-8-121. First, "excess proceeds shall . . . be paid into the general fund of the county. . . ." OCGA § 48-8-121(g)(2). Petitioner sought to have Respondents pay the "excess proceeds" of $11.8 million into the general fund of the county. Second, proceeds "shall be used by the county exclusively for the *purpose* or purposes specified in the *resolution*. . . ." OCGA § 48-8-121(a)(1) (emphasis added). Petitioner sought to have Respondents use the "excess proceeds" for the exclusive purpose stated in the Resolution pursuant to OCGA § 48-8-121(a)(1), where Paragraph 8 of the Resolution states, in part, that "excess proceeds shall . . . be paid into the general funds of the county and shall be used for the purpose of reducing ad valorem taxes." (Emphasis in original). Respondents have not complied with either statutory duty; instead, Respondents have budgeted the "excess proceeds" for additional SPLOST projects from the SPLOST account. The trial court determined that Petitioner's claims failed as a matter of law and entered judgment in favor of Respondents. See App. D at 20a.

On direct appeal to the Supreme Court of Georgia, Petitioner presented Respondents' duties under OCGA §§ 48-8-121(g) and -121(a)(1) as separate issues. In one enumeration of error, Petitioner stated that the trial court failed to correctly construe OCGA § 48-8-121(g)(1)(B) and -(g)(2) by finding there was no duty for Respondents to pay the "excess proceeds" to the general fund of the county. In another, Petitioner stated that the trial court failed to correctly construe OCGA § 48-8-121(a)(1) by finding there was no duty for Respondents to use "excess proceeds" exclusively for the purpose stated in the Resolution. In another, Petitioner presented an issue involving the applicability or relevancy of

Dickey v. Storey, 262 Ga. 452 (1992) with respect to "excess proceeds" and the fact that the language of OCGA § 48-8-121(a)(1) refers to *purposes* – not *projects*. See App. B at 6a. The Court affirmed the judgment of the trial court without addressing any of these issues. See App. B at 7a.

The Court correctly identified the two measurements of "excess proceeds" defined by statute: the maximum cost measurement and the actual cost measurement. App. at 4a. The Court also acknowledged that "excess proceeds" currently exist under the maximum cost measurement but not the actual cost measurement. See id. However, the Court switched sua sponte the maximum cost measurement with an "estimated cost" measurement although this was never advocated by Respondents nor subjected to Petitioner's scrutiny. Id. After shifting its focus to the estimated cost measurement, the Court held that "there can be no 'excess' SPLOST proceeds so long as revenue is available and the projects specified in the resolution imposing the tax have not been completed." App. B at 6a-7a. The Court has held that the maximum cost measurement does not apply where the actual cost measurement of "excess proceeds" has not been met, and that both conditions must be met before "excess proceeds" exist.

In reaching this holding, the Court committed many "plain errors"[4] in the application of its statutory construction methodology. As the remainder of this Petition will demonstrate, **the Court construed the statutes using**

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[4] "Plain errors" is defined herein as errors so obvious and substantial that the Court's failure to correct them on Motion for Reconsideration has infringed on Petitioner's due-process rights and damaged the integrity of the judicial process. See BLACK'S LAW DICTIONARY 563 (7th Ed.).

erroneous, omitted, incomplete, and overlooked statutory language. By using erroneous language, the Court failed to construe the correct language of the statute. By omitting language, the Court failed to consider the *actual expressed intent* of the General Assembly for the use of "excess proceeds." By providing incomplete language, the Court failed to consider a salient "if-then" condition which changed the context of the statute under review from one of choice to one of condition. By overlooking language, the Court failed to consider the alternative statutory definition of "maximum cost" when it switched to "estimated cost." Although the Court purports to discuss legislative intent, the Court failed to consider the intent of a legislative bill enacted just two years before the SPLOST of the instant case – a bill that amended the very language of the statutes being construed. See generally App. B at 4a-7a.

The statutory construction methodology employed by the highest court in the State of Georgia has denied Petitioner his constitutional right of due process, i.e., fundamental fairness and substantial justice. Petitioner has been denied due process because the holding of the Court was based on the following:

First, OCGA § 48-8-121(g)(2) was construed using erroneous and omitted statutory language. See App. B at 4a.

Second, OCGA § 48-8-121(g)(1)(B) was construed with incomplete statutory language, omitting the salient "if-then" condition that changes the entire context of the statute. See id.

Third, the maximum cost measurement of "excess proceeds" in OCGA § 48-8-121(g)(1)(B) was replaced with the estimated cost measurement by the Court sua sponte

without consideration given to the existing alternative definition provided in OCGA § 48-8-111(a)(3), which the Court omitted from consideration. See id. at 4a-7a.

Fourth, there was no discussion of House Bill 1704 ("HB 1704") – a bill enacted in 1994 that directly impacted the very language of OCGA §§ 48-8-111(a)(3) and -121(g)(1)(B) under construction – although "[i]n all interpretations of statutes, the courts shall look *diligently* for the intention of the General Assembly. . . ." OCGA § 1-3-1(a) (emphasis added); see 1994 Ga. Laws 1668 et seq.

Finally, the 1992 holding of Dickey was not accurately reconciled with "excess proceeds" because the Court failed to use correct and complete statutory language in its construction of OCGA §§ 48-8-121(a)(1), -121(g)(1)(B), and -121(g)(2) and failed to consider the 1994 amendments of HB 1704.

The constitutional issues of the preceding plain errors were first raised as questions of fundamental fairness, substantial justice, separation of powers, and the fairness, integrity, or public reputation of judicial proceedings in Petitioner's Motion for Reconsideration. The Court denied reconsideration without comment in a 4-3 decision. App. A at 1a.

REASONS FOR GRANTING THIS PETITION

1. The Court Denied Petitioner *Fundamental Fairness* And *Substantial Justice* By Construing Statutes With Erroneous, Omitted, And Incomplete Statutory Language.

Code Section 48-8-121(g)(2) states, in relevant part, that "excess proceeds shall next be paid into the general fund of

the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes." The Court stated that "OCGA § 48-8-121(g)(2) provides, in relevant part, that the County can use such proceeds *only* to reduce ad valorem taxes. App. B at 4a (emphasis added). **This was erroneous**.

The significance of this error is prejudicial. Appearing in the first paragraph of Division 2, it sets the direction for the remainder of the Opinion. Just two sentences later at the end of the first paragraph, the Court framed the issue based on this false foundation. See id. The discussion that follows in the Opinion only magnifies the error. Determinations regarding "excess proceeds" and legislative intent have been founded on this mistake, and the conclusion is rooted in a defective premise.

The significance of this misstatement is equally prejudicial for the discussion that does not occur. The Court omitted from its discussion the following language of OCGA § 48-8-121(g)(2): "*excess proceeds shall* next be paid into the general fund of the county, it being the *intent* that any funds so paid into the general fund of the county. . . ." (Emphasis added). There are two factors here that further exacerbate the inequity against the Petitioner.

First, the legislature's mandate of the use of "excess proceeds" is clear and unambiguous, i.e., a payment to the general fund is required. See App. B at 6a (noting the term "shall" is a clear and unambiguous term). Because it was not disclosed, the clear mandate to pay "excess proceeds" into the general fund was not discussed. Moreover, this was precisely one of the controversies presented to the Court on appeal that was not resolved.

Second, the Court has a responsibility to look *diligently* for the intent of the General Assembly. See OCGA § 1-3-1(a). However, the very phrase in which the General Assembly expressed its intent of "excess proceeds" does not appear. The Court has purported to ascertain legislative intent of the "excess proceeds" yet it fails to disclose the very sentence where "excess proceeds" and intent appear together. See App. B at 5a-7a. By omitting the "general fund" and "intent" language from OCGA § 48-8-121(g)(2), the Court has denied the diligence (or process) due Petitioner.

The Court has also been unfair and unjust to Petitioner by missing the salient language of OCGA § 48-8-121(g)(1)(B). Code Section 48-8-121(g)(1)(B) states, in whole, the following:

> *If* the county receives from the tax net proceeds in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax or in excess of the actual cost of such project or projects, *then such excess proceeds shall be subject to and applied as provided in paragraph (2) of this subsection.* (Emphasis added).

The Court has omitted the conjunction "if" that precedes the conjunction "or." See App. B at 4a. The natural meaning of "if" is "introducing a conditional clause: on the condition or supposition that; in the event that. . . ." The New Oxford Dictionary (2001). Thus, the Court failed to disclose a term that changes the context of the statute from one being phrased as a *connective* (marking a *choice*) to one being phrased in the *disjunctive* (marking a *condition*). Instead, the Court determined that Respondents have a choice between the maximum cost measurement of "excess

proceeds" and the actual cost measurement without any conditions. See App. B at 4a.

Petitioner has been judged without consideration given to the "if-then" disjunctive phrasing and the term "shall." Had these been considered, the Court would have shifted its discussion to determine whether the "if-then" condition triggers a condition upon which the legislature clearly subjects and applies "excess proceeds" to the payment to the general fund of the county. Thus, the Opinion lacks the minimal contextual accuracy because the context of a condition preceding a clear legislative mandate is neither disclosed nor discussed.

Petitioner has been prejudiced by the Court's narrowing of the conjunction "or" to mean only a choice or an election to do one of two things. See infra App. B at 4a (citing Gearinger v. Lee, 266 Ga. 167 (1996)). This is contrary, however, to the actual holding of Gearinger where the use of "or" was held to be in the disjunctive. "While the word 'or' can be interpreted either as a disjunctive term or as a reiterative term, where a legislative provision is phrased in the disjunctive, *it must be so construed* absent a clear indication that a disjunctive construction is contrary to the legislative intent." Gearinger at 169 (emphasis added) (internal citation omitted).

In the instant case, the use of "or" clearly takes the form of a disjunctive as it falls within the "if-then" condition. The Court's selectivity of just one sentence from the unanimous holding of Gearinger is detrimental against Petitioner in its application. It has foreclosed Petitioner's opportunity to have his position judged on the complete holding of compelling precedent.

In its discussion of "or," the Court stated "the General Assembly anticipated that, on occasion, actual cost would be the applicable standard for determining 'excess proceeds'." App. B at 5a. When this rationale is applied more fully, however, there will never be a time when the "actual cost" measurement does not apply. If the proceeds in excess of the maximum amount must be used to complete projects, then the "maximum cost" measurement will never be determinative of "excess proceeds."

Additionally, the General Assembly did not use the conjunction "and." The Court, however, has effectively replaced it for "or." Because "excess proceeds" currently exist under the "maximum cost" measurement, the Court has concluded that "excess proceeds" will not exist until both the "maximum cost" *and* "actual cost" measurements have been met. Clearly, the General Assembly chose the conjunction "or" - not "and."

Overall, it has been unfair and unjust for Petitioner to be judged on erroneous, omitted, and incomplete statutory language. It is unfair because Petitioner should be judged on what the statutes actually state and not what the Court misstates. It is also unjust because the Court should know and understand the actual and complete language of the statutes being construed; at minimum, the Court should have demonstrated an awareness of the actual language being construed to provide the most basic form of justice. Because fundamental fairness and substantial justice have not been afforded to Petitioner, due process has been denied.

2. The Court Denied Petitioner *Fundamental Fairness* And *Substantial Justice* By Replacing A Statutory Definition With A Non-Statutory Definition Sua Sponte While Overlooking The Existing Alternative Definition Provided By The General Assembly.

The Court replaced the maximum cost measurement of "excess proceeds" with the estimate cost measurement. "The determinative factors are the *estimated* and *actual* costs of the project." App. B. at 4a (emphasis added). This new definition was created sua sponte, for it had not been advocated by the Respondents nor subjected to Petitioner's scrutiny. The Court failed to consider the alternative definition already provided by General Assembly in OCGA § 48-8-111(a)(3): "[t]he maximum cost of the project or projects which will be funded from the proceeds of the tax, which *maximum cost shall also be the maximum amount of net proceeds to be raised by the tax*." (Emphasis added). The Court missed the determinative fact that maximum cost measurement is the same as "the maximum amount of net proceeds to be raised by the tax."

Adding to the unfairness against Petitioner was the Court's failure to consider HB 1704 and the intent of the General Assembly when it amended the very provisions at issue in 1994. Sections 3 and 6 of HB 1704 removed a "roads purposes" exception. See 1994 Ga. Laws at 1670-72. Prior to 1994, the maximum amount and maximum cost provisions of these statutes were not applicable if funds were used in whole or in part for roads purposes. See OCGA 48-8-111(a)(3) (1993); OCGA § 48-8-121(g) (1993). This meant that there was no set maximum amount of net proceeds to be raised by the tax and no maximum cost measurement of "excess proceeds" if proceeds were used for roads purposes.

After 1994, the maximum amount and maximum cost provisions were made applicable *for all purposes without exception*. Accordingly, "excess proceeds" under the maximum cost measurement came into existence in 1994 and *just two years prior to the SPLOST of the instant case*.

The Court has failed to "look *diligently* for the intention of the General Assembly" in 1994. OCGA § 1-3-1(a) (emphasis added). The overlooked definition and the Court's failure to recognize the legislative intent of HB 1704 have prejudiced the Petitioner. Had the Court considered the alternative definition established in 1994, the simplicity of "excess proceeds" within the totality of the SPLOST would have come into view. As a result of HB 1704, the county determines a *maximum amount* through estimates – and *not an estimated amount of costs*. Cf. App. B at 4a-7a. This *maximum amount of net proceeds to be raised by the tax* is also *the maximum cost of projects which will be funded*. Net proceeds collected above the maximum amount to be raised are "excess" and defined in OCGA § 48-8-121(g)(1)(B) as "excess proceeds." As "excess proceeds," amounts above the maximum amount to be raised must be paid to the general fund of the county pursuant to OCGA § 48-8-121(g)(2), where the county may spend such proceeds from the general fund in any lawful manner. The legislature recommended that the county use such proceeds to reduce ad valorem taxes but held short of mandating such use, thereby allowing the county discretionary use of such proceeds from the general fund only. Clearly, the totality of the SPLOST reveals the simplicity of "excess proceeds."

The Court's sua sponte action of creating a third definition to measure "excess proceeds" while failing to consider the existing alternative definition of OCGA § 48-8-111(a)(3) has been prejudicial to Petitioner. Had the Court considered

either the alternative definition of OCGA § 48-8-111(a)(3) or the intent behind HB 1704, the Court would have realized that the construction of these statutes "square with common sense and sound reasoning." Cf. App. B at 5a. The Court would have also realized that the payment of "excess proceeds" into the general fund of the county is merely the means with which the General Assembly limits the county's power to spend on additional SPLOST projects from the SPLOST account. Clearly, this does not "result in unreasonable consequences or absurd results not contemplated by the legislature." Cf. App. B at 7a.

Because the Court overlooked the existing alternative definition and failed to look for the intent of the General Assembly behind HB 1704, Petitioner has been denied due process. It was fundamentally unfair because Petitioner should have been judged on those definitions appearing in statute as intended by the General Assembly before the Court resorted to creating another definition sua sponte. It was also substantially unjust because Petitioner has been judged without the Court considering the intent of the General Assembly in 1994 and just two years prior to the SPLOST of the instant case.

3. The Court Denied Petitioner *Fundamental Fairness* And *Substantial Justice* By Addressing An Abandoned Issue And Not The Actual Controversies.

The Court addressed an abandoned issue and not the actual controversies. Petitioner did not present on appeal the issue that "pursuant to OCGA § 48-8-121(g)(1)(B) and (g)(2), any 'excess proceeds' must be used to reduce ad valorem taxes." App. B at 3a. Petitioner abandoned this issue after the instant case was initiated in 2002. The Court, however,

continued with the issue by erroneously stating that "OCGA § 48-8-121(g)(2) provides, in relevant part, that the County can use such excess proceeds only to reduce ad valorem taxes." App. B at 4a. In addition, the Court omitted the statutory language where "excess proceeds shall next be paid into the general fund of the county[.]" OCGA § 48-8-121(g)(2). The Court also omitted the "if-then" conditional phrasing and the imperative "shall" from OCGA § 48-8-121(g)(1)(B). See id. By the end of the first paragraph of Division 2, the Court had redefined the issue premised with erroneous, omitted, and incomplete statements of statutory language. See id. The Opinion was formed on these misstatements of law.

The actual controversies were not addressed on appeal. As enumerated in one error, the Court did not address the merits that "excess proceeds shall next be paid into the general fund of the county[.]" OCGA § 48-8-121(g)(2). As enumerated in another, the Court did not address the merits that proceeds to be used "exclusively for the purpose or purposes specified in the resolution[,]" where "excess proceeds" had an exclusive purpose specified in Paragraph 8 of the Resolution. OCGA § 48-8-121(a)(1); see App. B at 6a (noting that "'exclusively' and 'purpose or purposes specified' are clear and unambiguous terms"). As enumerated in another, the Court did not address whether the 1992 holding of Dickey was applicable or relevant to "excess proceeds" after HB 1704 was enacted in 1994.

The Court addressed and resolved a moot issue instead of the actual controversies. This is fundamentally unfair to Petitioner because the Court has judged him on a non-existent issue. Also, the Court has been substantially unjust to Petitioner by not addressing the actual controversies, especially when this was Petitioner's only opportunity for

appellate review in Georgia. See OCGA § 9-6-28 (authorizing direct appeal to the Supreme Court of Georgia for a mandamus action instead of intermediate appeal to the Court of Appeals of Georgia). Because fundamental fairness and substantial justice have been denied, due process has been denied.

4. The Court Impermissibly Usurped The General Assembly's Inherent Taxation Powers And Violated The Separation Of Powers Guaranteed By The Georgia Constitution By Construing Taxation Statutes On Erroneous, Omitted, Incomplete, and Overlooked Language.

"The maximum cost of the project or projects which will be funded from the proceeds of the tax, which maximum cost shall also be the maximum amount of net proceeds to be raised by the tax." OCGA § 48-8-111(a)(3). This single sentence sets the limits of a county's power to tax and its power to spend. The power to tax is limited by *the maximum amount of net proceeds to be raised by the tax*. The power to spend is limited by *the maximum cost of the project or projects*, for this is the maximum cost measurement of "excess proceeds" stated in OCGA § 48-8-121(g)(1)(B).

When taking into account the totality of SPLOST, OCGA §§ 48-8-111(a)(3), -121(g)(1)(B), and -121(g)(2) provide the means with which the General Assembly in Georgia limits a county's power to tax and its power to spend. By overlooking OCGA § 48-8-111(a)(3), the Court did not consider the power to tax and the power to spend limitations placed upon the Respondents. By providing an incomplete statement of OCGA § 48-8-121(g)(1)(B), the Court did not recognize that the "if-then" condition was the General Assembly's method to limit the Respondents' power to spend the net proceeds

collected above the maximum amount of $60 million. By failing to state the correct and complete language of OCGA § 48-8-121(g)(2), the Court did not address the mandate that Respondents pay the "excess proceeds" of $11.8 million to the general fund of the county. By failing to address the legislative intent of HB 1704 in 1994, the Court did not recognize the maximum amount and maximum cost measurement of "excess proceeds" were new limitations upon Respondents' power to tax and power to spend which theretofore did not apply if proceeds were used for "roads purposes." The Court, instead, derived legislative intent from its own holding of the 1992 case of Dickey – a case decided two years before the General Assembly incorporated the taxation limits of HB 1704. See App. at 6a.

By construing taxation statutes on erroneous, omitted, incomplete, and overlooked language, the Court has impermissibly usurped the General Assembly's taxation power and violated the separation of powers guaranteed by the Georgia Constitution. See GA. CONST. Art. I, § II, ¶ III; see also III, § I, ¶ I & Art. VII, § III, ¶ I(a). The Court's holding empowers Respondents to spend beyond the maximum amount of $60 million where no power previously existed. The General Assembly did not grant Respondents the power to spend beyond the upper limit of $60 million. For the Court to hold otherwise usurps the taxation power of the General Assembly and violates the separation of powers guaranteed by the Georgia Constitution.

5. The Court Has Impaired The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings By Construing Statutes Based On Erroneous, Omitted, Incomplete, And Overlooked Statutory Language.

This Court has addressed questions of public importance such as those relating to judicial administration. "The Supreme Court can determine issues of judicial administration which seriously affect the fairness, integrity, or reputation of public judicial proceedings." 2A Fed. Proc., L. Ed. § 3:861.

This Court should review the 4-3 decision of Division 2 of the judgment because the formation of a judgment based on erroneous, omitted, incomplete, and overlooked statutory language – along with the Court's failure to examine HB 1704 for legislative intent – seriously undermines the fairness, integrity, and reputation of the highest court in the State of Georgia.

CONCLUSION

Petitioner respectfully requests that this Court grant the writ.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF GEORGIA

Case No. S03A1444

Atlanta, April 14, 2004

JAMES L. HAUGEN, Plaintiff,

v.

HENRY COUNTY, et al., Defendants.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears, P.J., Thompson and Hines, JJ. who dissent.

APPENDIX B

SUPREME COURT OF GEORGIA

Case No. S03A1444

[Decided March 1, 2004]

HAUGEN,)
Plaintiff,)
)
v.)
)
HENRY COUNTY et al.)
Defendants.)
)

CARLEY, Justice.

In September of 1996, the voters of Henry County passed a referendum authorizing the imposition of a Special Purpose Local Option Sales Tax (SPLOST) for a period of five years. The tax was intended to raise not more than $60 million for road and street repair, as well as for specified capital projects. During the five-year period, the tax generated more than $71.8 million in revenue. Although $60 million was spent for the stated purposes, certain of the projects remained incomplete. When the County proposed to expend the additional SPLOST funds on the unfinished projects, James L. Haugen, who is a resident and taxpayer of the County, instituted an action seeking mandamus and injunctive relief.

He alleged that, pursuant to OCGA § 48-8-121 (g) (1) (B) and (g) (2), any "excess proceeds" must be used to reduce ad valorem taxes.

The County moved to dismiss and the trial court granted the motion on procedural and on substantive grounds. It found that Haugen had failed to comply with OCGA § 9-6-27 (a), because no mandamus nisi was granted and served on the County. It also concluded that there were no "excess proceeds" as defined by OCGA § 48-8-121 (g) (1) (B) and (g) (2). Haugen appeals from the order of the trial court dismissing all claims against the County.

1. Under OCGA § 9-11-4 (k), "ordinary process" may be used in a mandamus action as an alternative method of service to that authorized by OCGA § 9-6-27 (a). DeKalb County v. Chapel Hill, 232 Ga. 238, 239 (1) (205 S.E.2d 864) (1974). Thus, Haugen's failure to comply with OCGA § 9-6-27 (a) is immaterial, because he served the County in the ordinary manner. The County's reliance on OCGA § 9-11-81 is misplaced, since OCGA § 9-6-27 (a) complements, rather than conflicts with OCGA § 9-11-4 (k), which expressly establishes that

> [t]he methods of service provided in this Code section may be used as alternative methods of service ... in any other special statutory proceedings ... and, in any such proceeding, service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this Code section.

See In the Matter of: Inquiry Concerning a Judge, 265 Ga. 326, 329 (2) (454 S.E.2d 780) (1995) (using OCGA § 9-6-27

as the alternative to OCGA § 9-11- 4). Accordingly, the trial court erred in dismissing the action on procedural grounds.

2. The tax was in effect for the full five-year period. See Jackson v. Shadix, 272 Ga. 631, 632 (1) (533 S.E.2d 706) (2000) (construing former OCGA § 48-8-112, which is controlling here as well). However, Shadix did not concern and, thus, is not dispositive of, the substantive issue of statutory construction that is presented here. Under OCGA § 48-8-121 (g) (1) (B), the taxing authority receives excess net SPLOST proceeds to the extent that the revenue obtained is "in excess of the maximum cost of the project or projects stated in the resolution ... or in excess of the actual cost of such project or projects ...." OCGA § 48-8-121 (g) (2) provides, in relevant part, that the County can use such excess proceeds only to reduce its ad valorem taxes. The maximum cost of the projects stated in the SPLOST resolution was $60 million, but the actual cost of the projects exceeds that amount. Accordingly, the issue to be decided is whether the County is entitled to use the $11.8 million plus accrued interest to complete the projects before it can be charged with possessing any "excess" SPLOST proceeds.

"The natural meaning of 'or,' where used as a connective, is "'to mark an alternative and present choice, implying an election to do one of two things ....'" [Cit.]" Gearinger v. Lee, 266 Ga. 167, 169 (2) (465 S.E.2d 440) (1996). Thus, OCGA § 48-8-121 (g) (1) (B) provides that SPLOST proceeds are considered to be "excess" either when they are greater than the cost of the project specified in the resolution or when they are greater than the actual cost of the project. The determinative factors are the estimated and the actual costs of the project. However, the statute does not expressly provide which alternative applies where, as here, the net tax proceeds exceed the estimated, but not the actual, cost of the project.

The dissent simply assumes that, because the General Assembly used the word "or" to separate the two alternatives, whichever cost is the lesser would control, with the result that the estimated cost establishes the maximum amount of SPLOST revenue that can be expended on the project. As soon as the tax proceeds reach an amount equal to the estimated cost, all additional proceeds are deemed excess. Thus, according to that interpretation, once the County raised the $60 million specified in the resolution, all further SPLOST revenues were excess even though the projects had not been completed.

There is nothing in the statute to support the conclusion that the estimated cost invariably controls over the actual cost. By using the word "or," the General Assembly anticipated that, on occasion, actual cost would be the applicable standard for determining "excess proceeds." The construction of the statute advanced by the dissent leads to the anomalous result that the County cannot use available SPLOST revenues to complete those very projects for which the tax was expressly proposed, approved and imposed. However, one of the cardinal rules of statutory construction requires the courts to "consider the consequences of any proposed interpretation and not construe the statute to reach an unreasonable result unintended by the legislature. [Cit.]" Trust Co. Bank v. Ga. Superior Court Clerks' Cooperative Auth., 265 Ga. 390 (1) (456 S.E.2d 571) (1995). "'"The construction (of statutes) must square with common sense and sound reasoning."' [Cit.]" Thornton v. Clarke County School Dist., 270 Ga. 633, 634 (1) (514 S.E.2d 11) (1999). Moreover, "[l]anguage in one part of the statute must be construed in light of the legislature's intent as found in the whole statute. [Cit]" Echols v. Thomas, 265 Ga. 474, 475 (458 S.E.2d 100) (1995). OCGA § 48-8-121 (g) (1) (B) does not exist in isolation. OCGA § 48-8-121 (a) (1) expressly provides that "[t]he

proceeds received from the tax authorized by this article shall be used by the county exclusively for the purpose or purposes specified in the resolution or ordinance calling for imposition of the tax." "Shall," "exclusively" and "purpose or purposes specified" are all clear and unambiguous terms. Thus, to satisfy the mandatory requirement imposed by OCGA § 48-8-121 (a) (1), the taxing authority must necessarily use all SPLOST proceeds to complete the projects for which the tax was imposed, before any revenue derived from the tax can be deemed to be "excess" and available for use in connection with another purpose. The County

> is bound ... to complete all projects ... unless circumstances arise which dictate that projects which initially seemed feasible are no longer so. In this regard the governing authority has discretion to make adjustments in the plans for these projects, but may not abandon the projects altogether.

Dickey v. Storey, 262 Ga. 452, 456 (3) (423 S.E.2d 650) (1992). Therefore, as a matter of law, there can be no "excess" SPLOST proceeds so long as revenue is available and the projects specified in the resolution imposing the tax have not been completed.

Accordingly, the only construction of OCGA § 48-8-121 (g) (1) (B) which comports with sound reasoning and the entirety of the statute of which it is a part is that the actual cost, rather than estimated cost, establishes the maximum amount of SPLOST revenue that can be expended. While estimated "or" actual cost are the applicable standards for determining "excess proceeds," on those occasions when actual cost exceeds estimated cost, actual cost is the determinative standard. Thus, even though the tax proceeds received by the taxing authority may exceed the estimated cost

of any given unfinished project, no "excess" proceeds exist so long as the project remains incomplete. To hold otherwise would render OCGA § 48-8-121 (a) (1) meaningless and sanction the unnecessary abandonment of projects based upon a good-faith, but incorrect estimate as to the effect of inflation or other variables on the actual cost to complete them.

The judiciary has the duty to reject a construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature. General Electric Credit Corp. of Ga. v. Brooks, 242 Ga. 109, 112 (249 S.E.2d 596) (1978). The General Assembly did not intend that a taxing authority be precluded from expending available SPLOST proceeds on unfinished projects simply because the original estimate of the cost of completion was too low. The trial court correctly interpreted the relevant statutory provisions and, therefore, properly dismissed Haugen's petition on substantive grounds.

Judgment affirmed. All the Justices concur, except Sears, P. J., Thompson and Hines, JJ., who dissent.

APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S03A1444

[Filed March 1, 2004]

HAUGEN, Plaintiff,

v.

HENRY COUNTY, et al., Defendants.

HINES, Justice, dissenting.

I agree with Division 1 of the majority opinion that OCGA § 9-11-4 (k) permits ordinary process as a means of service in a mandamus action. However, I respectfully dissent to the holding in Division 2 that the superior court properly dismissed the taxpayer's petition on substantive grounds. The superior court erred in its application of OCGA § 48-8-121(g)(1)(B) to find that taxpayer Haugen's claims failed as a matter of law.

The pivotal question in this case is whether the $11.8 million in net tax revenues, collected over and above the $60 million amount specified in both the authorizing resolution and the referendum voted on by the taxpayers of Henry

County, qualifies as "excess proceeds" under OCGA § 48-8-121 (g) (1) (B), and therefore, is required to be used to reduce ad valorem taxes. See OCGA § 48-8-121 (g) (2).[1] The strained analysis of the majority completely nullifies the statutory provision and deprives the taxpayers of the rightful reduction of their tax burden.

OCGA § 48-8-121(g)(1)(B) plainly defines "excess proceeds" as net tax proceeds "in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax *or* in excess of the actual cost of such project or projects." (Emphasis supplied.) The statute is not ambiguous. As the majority acknowledges, the statutory language is in the disjunctive, and the well-settled meaning of the connective "or" is that it presents an alternative choice, that is, an election of one of two things. *Gearinger v. Lee*, 266 Ga. 167, 169 (2) (465 S.E.2d 440) (1996); *Ga. Paper Stock Co. v. State Tax Bd.*, 174 Ga. 816, 819 (164 SE 197) (1932). "[W]hen the language of a statute is plain and unambiguous, judicial construction is forbidden. *Six Flags Over Ga. v. Kull*, 276 Ga. 210, 211 (576 S.E.2d 880) (2003)." *Jennings v. McIntosh County Bd. of Comm'rs*, 276 Ga. 842, 845 (3) (583 S.E.2d 839) (2003). Yet, the majority takes it upon itself to reconstruct the statute in order

---

[1] OCGA § 48-8-121 (g) (2) provides:

Excess proceeds subject to this subsection shall be used solely for the purpose of reducing any indebtedness of the county other than indebtedness incurred pursuant to this article. If there is no such other indebtedness or, if the excess proceeds exceed the amount of any such other indebtedness, then the excess proceeds shall then next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes.

to avoid what it characterizes as the "anomalous result that the County cannot use available SPLOST revenues to complete those very projects for which the tax was expressly proposed, approved[,] and imposed." But the majority's reasoning is the anomaly.

The statute provides that there are "excess proceeds" in two instances - when the net tax revenues exceed the maximum cost of the project or projects specified in the resolution or ordinance, or when these revenues exceed the actual cost of such project or projects. The majority scoffs at the estimated cost component of the statute and focuses solely on the fact that certain projects funded by the SPLOST remain uncompleted. Yet it is the estimated cost, in this case $60 million, that is proposed and presented to the taxpayers for their approval. And it is this estimated cost that the General Assembly has clearly determined to be one of two yardsticks by which to measure "excess proceeds" under OCGA § 48-8-121(g)(1)(B).

Even if the forthright language of the statute could be characterized as ambiguous, and thus susceptible of judicial construction, basic rules of statutory construction will produce the same result. This Court must give a sensible and intelligent effect to each part of the statute. It cannot be presumed that the legislature intended that any part of a statute would be without meaning and mere surplusage. *Transportation Ins. Co. v. El Chico Restaurants*, 271 Ga. 774, 776 (524 S.E.2d 486) (1999); *Brown v. Liberty Co.*, 271 Ga. 634, 635 (522 S.E.2d 466) (1999). What is more, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly. *Kemp v. City of Claxton*, 269 Ga. 173, 175 (1) (496 S.E.2d 712) (1998). A stated purpose of Ga. L. 1994, p. 1668, applicable to the SPLOST in this case is "to change certain provisions regarding the expenditure of

excess proceeds." *Id.* at 1669. This demonstrates the clear legislative intent that "excess proceeds" can exist in the two instances specified in OCGA § 48-8- 121(g)(1)(B).

Last, but certainly not least, the majority's decision works a grave injustice to the taxpayers of Henry County. The result is that the burden of the uncompleted county projects is shifted to the unwitting taxpayer, rather than holding the taxing authority accountable for a seemingly unrealistic assessment of cost and/or project scope. It forces the taxpayers of Henry County to fund county projects in an amount which was never disclosed, and certainly never approved by them. In the final analysis, it is simply that the taxing authority should say what it means and mean what it says. The taxpayers deserve no less.

I am authorized to state that Presiding Justice Sears and Justice Thompson join in this dissent.

APPENDIX D

IN THE SUPERIOR COURT OF HENRY COUNTY
HENRY COUNTY, GEORGIA

CIVIL ACTION FILE NO. 02-CV-1883-M

[Filed March 31, 2003]

JAMES L. HAUGEN, Plaintiff,	)
vs.	)
HENRY COUNTY, GEORGIA, a Political Subdivision; LELAND MADDOX, WARREN HOLDER, GARY M. FREEDMAN, JASON HARPER, GERRY ADAMS, and LEE HOLMAN, Individually and as members of the Board of Commissioners of Henry County, Georgia, Defendants.	)

HENRY COUNTY'S PROPOSED ORDER GRANTING JUDGMENT AS A MATTER OF LAW IN FAVOR OF DEFENDANTS

Plaintiff James L. Haugen filed this mandamus action against Defendants alleging that Defendants have refused or failed to perform their ministerial duties with respect to a

Special Purpose Local Option Sales Tax ("SPLOST") as authorized by OCGA §§ 48-8-110 *et seq.* The SPLOST was imposed pursuant to a resolution calling for submission to the voters for approval of a referendum; the resolution provided that the SPLOST would be used for various specified purposes - including road, street, and bridge purposes, as well as capital outlay projects for the use and benefits of the citizens of Henry County, including library facilities and expansion and renovation of the Henry County Courthouse. The SPLOST has generated approximately $71.8 million in net proceeds for Henry County. With accumulated interest, the total amount in the SPLOST account was approximately $76.4 million as of May 30, 2002.

Plaintiff ultimately contends that Defendants are not permitted to spend $11,877,176— the amount of proceeds received above the $60 million identified in the resolution— of the total amount raised by the SPLOST for the purposes outlined in the resolution. For the reasons stated below, the Court grants judgment as a matter of law in favor of Defendants.

I. FINDINGS OF FACT

On August 5, 1996, Henry County, Georgia passed Resolution No. 96-14 (the "Resolution"), pursuant to which the Board of Commissioners of Henry County proposed a SPLOST to be used and expended for: (1) "[r]oad, street, and bridge purposes;" and (2) "capital outlay projects for the use and benefits of the citizens of the entire county," including "library facilities, parks and recreational facilities; expansion and renovation of the Henry County courthouse, including a parking deck; senior citizens activities centers including administrative space, a center for the training of the developmentally disabled; an addition to the Henry County,

jail; fire stations, and a performing arts center." (Resolution, ¶¶ 3(a), 3(b).)

The Resolution provided that the "duration of the sales and use tax imposed hereby shall be five calendar years" and that the "maximum cost of the projects which will be funded from the proceeds of the tax . . . shall be sixty million dollars." *(Id.,* ¶¶ 2, 5.) In addition, the Resolution specifically provided:

> If the county receives from the tax net proceeds in excess of the maximum cost of the projects stated in this resolution or in excess of the actual cost of such projects, then such excess proceeds shall be used solely for the purpose of reducing any indebtedness of the county other than bonded indebtedness and, if there is no such other indebtedness; or if the excess proceeds exceed the amount of any such other indebtedness, than the excess proceeds shall next be paid into the general fund of the county and shall be used for the purpose of reducing *ad valorem* taxes.

(*Id.*, ¶ 8.)

The Resolution was presented for approval to the county voters at an election on September 17, 1996. *(Id.,* ¶ 6.) The referendum ballot provided:

> Shall a special 1 percent sales and use tax be imposed in Henry County for a period not to exceed five years and for the raising of not more than $60,000,000 for road, street, and bridge purposes and for the purposes of capital outlay projects for the use and benefit of the citizens of the entire county consisting of library facilities; parks and recreational facilities; expansion

> and renovation of the Henry County courthouse, including a parking deck; senior citizens activities centers, including administrative space; a center for the training of the developmentally disabled; an addition to the Henry County jail; fire stations; and a performing arts center?

(Id., ¶ 6.) The referendum was held, and more than one-half of the votes favored imposing the SPLOST.

Prior to the Resolution, a study committee was formed to designate the projects to be included in the SPLOST referendum. (Affidavit of Ed Wallace ("Wallace Aff."), ¶ 3.) The SPLOST referendum was prepared and formulated based on the designated projects. (Wallace Aff., ¶¶ 4, 5.) Once prepared and formulated, the designated projects were disseminated to the voters for their review and inspection prior to the vote on the SPLOST referendum. (Wallace Aff., ¶ 6.) Upon approval by the voters, the designated projects became the projects listed in the SPLOST budget and account reports. (Wallace Aff., ¶¶ 7-11; Affidavit of Jerry Brooks ("Brooks Aff."), ¶¶ 5-7.)

Between March 1997 and April 2002, the tax generated approximately $71,877,176 in net proceeds, approximately $11.8 million more than the amount specified in the Resolution. With accumulated interest, the total amount in the SPLOST account was approximately $76.4 million as of May 30, 2002. As of October 22, 2002, approximately $60 million of the funds generated through the SPLOST had been spent on the projects defined in the Resolution and, as of that same date, numerous projects remained uncompleted and/or are ongoing, including parks and recreational facilities, library facilities, road and street projects, and the expansion and renovation of the Henry County Courthouse. (Brooks Aff., ¶¶

8, 9; Wallace Aff., ¶¶12, 13.) It is estimated that it will cost approximately $27.5 to $27.9 million to complete the road and street paving projects alone. (Brooks Aff., ¶ 10) Defendants intend to expend all of the remaining SPLOST funds on uncompleted or ongoing projects identified in the Resolution.

II. PROCEDURAL POSTURE

Plaintiff filed a mandamus action seeking to compel Defendants to perform what Plaintiff alleges as Defendants' statutory, or lawful duty with respect to the $11.8 million of additional funds received through the SPLOST— that is, funds in excess of the $60 million identified in the Resolution— on the projects specified in the Resolution. A hearing was set for October 4, 2002. Prior to the hearing, Plaintiff added a claim for injunctive relief seeking to prevent Defendants from spending the approximate $11.8 million prior to resolution by this Court of the claims presently before it.

At the hearing, Defendants moved to dismiss. Defendants argued that Plaintiff's action was barred because a mandamus nisi had not been granted or served and the mandamus hearing had not occurred within the period specified in the statute. Defendants also argued that further expenditure of the SPLOST proceeds on the projects identified in the Resolution is permissible under OCGA 48 -8-121 (g) (1) (B) because the net proceeds of the tax is not "in excess of the actual cost of such project," which currently is ongoing. Defendants argued that, as a result, Defendants are under no statutory or other duty to use any of the proceeds for ad valorem tax reduction.

III. CONCLUSIONS OF LAW

A. Plaintiff's Petition for Mandamus Is Dismissed With Prejudice for Failure to Obtain a Mandamus Nisi.

At the time of service of Plaintiff's petition, no mandamus nisi was granted and served upon any of the Defendants, nor has one been granted and served upon any of the Defendants through the present time. Pursuant to OCGA § 9-6-27(a) and relevant case law, Plaintiff's Petition for Mandamus therefore must be dismissed. *See Inquiry Concerning a Judge*, 265 Ga. 326 (1995) (noting that the procedures for notice and hearing under OCGA § 9-6-27 are required).

B. Plaintiff's Claims Fail As a Matter of Law.

Even if Plaintiff properly complied with the procedures required in a mandamus action, Plaintiff's claims nonetheless fail as a matter of law. Plaintiff argues that this case involves "excess proceeds," as that term is used in OCGA § 48-8-121(g)(1)(B), and therefore that such proceeds in excess of $60 million must be used to offset ad valorem taxes.

OCGA § 48-8-121(g)(1)(B) provides:

> If the county receives from the tax net proceeds in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax or in excess of the actual cost of such project or projects, then such excess proceeds shall be subject to and applied as provided in paragraph (2) of this subsection.

Based on this statutory language and the language of the Resolution, Plaintiff argues that "excess proceeds" exist in the amount of $11,877,176 — that is, the amount of proceeds generated above the $60 million originally specified in the Resolution. Plaintiff therefore argues that Defendants may not use the alleged "excess proceeds" to fund uncompleted projects specified in the Resolution, but instead must deposit the entire $11.8 million to the County's general fund. Plaintiff further contends that the language of the 1996 Resolution requires the current Board of commissioners to use that money to reduce ad valorem taxes in Henry County, and that the Commissioners have no discretion in the matter.

At the outset, this Court notes that the law grants to the Board of Commissioners of Henry County broad discretion in managing the affairs of the County, particularly with respect to the expenditure of tax dollars. *See Dickey v. Storey*, 262 GA. 452, 454 (1992). Absent clear abuse of such discretion, the courts will not interfere in County business affairs. *Id.* This Court finds no evidence that the Board of Commissioners of Henry County have abused its discretion to collect, manage, budget and spend the SPLOST proceeds.

In any event, Plaintiff s argument fails as a matter of law. First, Plaintiff' s argument flies in the face of the relevant statutory text. OCGA § 48-8-121(g)(1)(B) expressly defines "excess proceeds" as net proceeds in excess of "the actual cost of [the] project or projects [stated in the resolution or ordinance calling for the imposition of the tax]." Here, however, the "actual cost" of the projects has not been fully realized, as the projects are not yet complete and are currently ongoing. (Brooks Aff., ¶¶ 8, 9; Wallace Aff., ¶¶12, 13.) Any claim that "excess proceeds" exist is refuted by the undisputed facts in this case — which show that the cost of the projects identified in the Resolution far exceeds the $72

million collected in SPLOST proceeds and therefore that there can be no "excess proceeds" — and must be rejected.

In addition, contrary to Plaintiff's contentions, Plaintiff's argument is not advanced by the fact that the Resolution specified $60 million as the "maximum" amount sought to be raised by the SPLOST. The Georgia Supreme Court's opinions in *Jackson v. Shadix*, 272 Ga. 631 (2000) — in which the Supreme Court expressly permitted the county to collect SPLOST proceeds beyond the amount identified in the referendum — and *Shadix v. Carroll County*, 274 Ga. 560 (2001) " in which the Supreme Court expressly permitted the county to spend SPLOST proceeds beyond the amount specified in the referendum — are dispositive and compel the conclusion that Defendants are permitted to spend any SPLOST proceeds in excess of the stated amount to the extent those proceeds are collected during the time period identified in the Resolution. Defendants therefore are entitled to expend for SPLOST purposes all of the SPLOST proceeds generated during the relevant five year period, even if those proceeds exceed the amount identified in the Resolution.

Plaintiff's position is further undermined by the Supreme Court's opinion in *Dickey v. Storey*, 262 Ga. 452 (1992). There, the Supreme Court expressly held that the county board of Commissioners "is bound . . . to complete all projects listed in" the SPLOST budget and account reports and that the board "may not abandon the projects altogether." *Id.* at 456. But that is precisely what Plaintiff has asked this Court to direct, in seeking to prevent Defendants from expending the additional SPLOST funds on unfinished projects identified in the SPLOST reports, Plaintiff has asked this Court to enter an order that would directly conflict with the express holding in *Dickey*. *(See* Wallace Aff., ¶¶ 12, 13; Brooks Aft., ¶¶ 13, 14, 15,)

The SPLOST is by its terms a "special" tax that may be imposed only for "special purposes" which are defined by statute and which are required to be specifically described in the ballot question. See OCGA §§ 48-8-111, 48-8-121. It is inconceivable to this Court that the General Assembly would permit the County to collect SPLOST proceeds 'for the County's general fund purposes when the specific purposes approved by the voters remain unfinished. Because SPLOST proceeds are available to complete at least some of the remaining projects, the Court must deny Plaintiffs request for relief and grant judgment as a matter of law in favor of Defendants.

Because Plaintiff's claims on the merits fail as a matter of law, this Court also denies Plaintiff's request for injunctive relief.

IV. CONCLUSION

In accordance with the foregoing discussion, the Court grants JUDGMENT AS A MATTER OF LAW in favor of Defendants, and Plaintiff' s claims are hereby DISMISSED WITH PREJUDICE.

SO ORDERED, this 13 day of March, 2003.

/s/

L.A. McCONNELL, JR. SENIOR JUDGE
SUPERIOR COURT JUDGE

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(2)

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No. 03-1623

In the Supreme Court of the United States

JAMES L. HAUGEN,

Petitioner,

v.

HENRY COUNTY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR REHEARING

JAMES L. HAUGEN, ESQ.
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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner James L. Haugen respectfully moves for rehearing on his petition for writ of certiorari pursuant to Rule 44.2 of the Supreme Court Rules. In support thereof, Haugen presents herein "other substantial grounds not previously presented." SUP. CT. R. 44.2. Included herein for the record are the relevant papers presented to the Supreme Court of Georgia: Appellant's Motion for Reconsideration, Brief of Appellant, and Brief of Appellees. See infra App. E, F, and G, respectively.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. The Decision Of The Supreme Court Of Georgia Has Given Rise Unexpectedly To Federal Questions That Petitioner Has Had No Previous Opportunity To Assert Before His Motion For Reconsideration And Could Not Fairly Have Anticipated.

Ordinarily, it is too late to raise a federal question by a motion for reconsideration to the state appellate court. Herndon v. Georgia, 295 U.S. 441, 443 (1935). An exception exists, however, when the decision of that court has given rise unexpectedly to a federal question that the party seeking review has had no previous opportunity to assert and could not fairly have anticipated. Id. at 443-44 (citing Saunders v. Shaw, 244 U.S. 317 (1917); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930); Brinkerhoff-Faris Trust & Savings Co. v. Hill).

In Saunders, the aggrieved party raised a federal question of first instance after his application for rehearing before the highest court of the state was denied. This Court held the following:

> when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation.

Id. at 320 (internal citations omitted).

Likewise, the federal question in Gehner was raised of first instance on a motion for rehearing before the highest court of the state. Gehner at 319-20. This Court held that "[i]t may not reasonably be held that the company was bound to anticipate such a construction [of the state statute] or in advance to invoke federal protection[.]" Id. The judgment of the state's highest court was reversed. Id. at 322.

The plaintiff in Brinkerhoff-Faris found itself in a similar procedural stance by raising its federal claim on a petition for rehearing to the Supreme Court of Missouri. See Brinkerhoff-Faris at 677-78. This Court held that the party's claim that "the court transgressed the due process clause of the Fourteenth Amendment" was timely "since it was raised at the first opportunity." Id. This Court also held that

> [i]f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear *when that result is*

> *accomplished by the state judiciary in the course of construing an otherwise valid state statute.* The federal guaranty of due process extends to state action through its judicial . . . branch of government.

Id. at 679-80 (emphasis added) (internal citations omitted).

Haugen stood in same procedural posture as each of the aggrieved parties in Saunders, Gehner, and Brinkerhoff-Faris. He had no previous opportunity to assert the federal questions and could not fairly have anticipated raising them prior to the decision of the Supreme Court of Georgia. The federal questions presented involve the following three issues: the highest court of the state failed to convey an accurate understanding and presentation of the language being construed by misstating the statutes using erroneous, omitted, and incomplete language; failed to recognize and address an existing alternative definition provided by statute before it acted sua sponte and used a non-statutory definition; and failed to address the actual controversies on appeal while it addressed an abandoned issue.

First, there was no opportunity to raise issues with misstatements of statutory language, for the trial court stated the language correctly. The trial court understood and presented OCGA § 48-8-121(g)(1)(B) in its entirety. See Pet'r Pet. at 17a. The trial court did not present -121(g)(2); accordingly, there was no opportunity to raise issues regarding misstatements. See Pet'r Pet. at 12a-21a.

Not only was there no opportunity to raise these issues, Haugen could not have fairly anticipated these issues on appeal. He could have anticipated the use of judicial discretion to paraphrase statutes, but only if contextual integrity was maintained. There was no way that Haugen could have known the Supreme Court of Georgia would state that "the County can use such excess proceeds only to reduce

ad valorem taxes" under -121(g)(2) when, it fact, the statute states that "excess proceeds shall next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes." Pet'r Pet. at 7-8. To hold otherwise should strain the judicial conscience of this Court.

Nor could he have fairly anticipated that the court would have changed the context of -121(g)(1)(B) which led the court to hold that a choice existed when, in fact, the bracketing of the term "or" with the terms "if-then" strongly suggests a contextual change of the statute from one being phrased as a connective (marking a choice) to one being phrased in the disjunctive (marking a condition). Pet'r Pet. at 9-11. Haugen should not be "bound to anticipate such a construction or in advance to invoke federal protection[.]" Gehner at 320.

Second, Haugen had no opportunity to raise issues when the court acted sua sponte. Neither the trial court nor the parties mentioned the non-statutory definition of "estimated cost." See Pet'r Pet. at 12a-21a; see App. G at 69b-84b. Because the parties and trial court were silent with the use of "estimated cost," Haugen could not have fairly anticipated the use of "estimated cost." This holds especially true because Haugen discussed the existing alternative statutory definition of "maximum cost" in -111(a)(3) in his brief to the court. See App. F at 40b-42b.

Third, Haugen had no opportunity to raise issues when the court addressed an abandoned issue on appeal and not the actual controversies. The trial court correctly stated Haugen's general issue that the Respondents herein "are not permitted to spend $11,877,176 – the amount of proceeds received above the $60 million identified in the resolution. . . ." Pet'r Pet. at 13a. Unlike the Supreme Court of Georgia, it did not present the issue that "pursuant

to OCGA § 48-8-121(g)(1)(B) and (g)(2), any 'excess proceeds' must be used to reduce ad valorem taxes." Id. at 3a.

Because the trial court correctly stated Haugen's general issue, he could not have fairly anticipated that the court would present only the abandoned issue and not the actual issues. In this mandamus action, Haugen presented one of the issues by stating that the Respondents herein have "a duty to pay the 'excess proceeds' in the amount of $11,877,176 into the general fund of the county pursuant to OCGA § 48-8-121(g)(2)." App. F at 53b. Haugen presented the other issue by stating that, under -121(a)(1), Respondents have "the lawful duty to comply with the terms and conditions of the Resolution . . . [and] to use 'excess proceeds' in the amount of $11,877,176 exclusively for the purpose of ad valorem tax reduction pursuant to Paragraph 8 of the Resolution." Id. at 58b.

2. The Federal Questions Were Raised In The Motion For Reconsideration And Were Presented With Fair Precision and Due Time.

Federal questions should be presented in a manner that the courts are "apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." Webb v. Webb, 451 U.S. 493, 501 (1981).

> [N]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

PruneYard Shopping Center v. Robins, 447 U.S. 939, 946 (1980) (citing New York ex rel. Bryant v. Zimmerman, 278

U.S. 63, 67 (1928)).

Petitioner Haugen raised the federal questions in his Motion for Reconsideration by prefacing his arguments in the Introduction of his Motion:

> The Opinion is confusing, for it lacks crucial attention to critical details. It misstates statutory language, omits key statutory language, overlooks precedent, overlooks the totality of other SPLOST statutes, and overlooks material facts. Because there are many fatal discrepancies, *fundamental fairness and substantial justice* on behalf of Appellant demands this that Court GRANT this Motion for Reconsideration based on the discrepancies noted herein.
>
> App. E at 2b-3b (emphasis added).

In his summary, he made his demand for due process with the following: "Because the Opinion contains fatal discrepancies, Appellant James L. Haugen respectfully requests, and *fundamental fairness and substantial justice* demands, that this Court . . . GRANT Appellant's Motion to Reconsider of this Court Opinion of March 1, 2004. . . ." Id. at 20b (emphasis added). In his Motion for Rehearing, he made his demand for due process in similar fashion. See id. at 22b.

Phrases such as "fundamental fairness and substantial justice" and "right of hearing and right to be heard" invoke the Due Process Clause of the Constitution. The "fundamental-fairness doctrine" is "commonly considered synonymous with *due process*." BLACK'S LAW DICTIONARY 697 (8th ed. 2004) (emphasis in original). By using these terms of art, the Supreme Court of Georgia was "apprised of the nature or substance of the federal claim[.]" Due process under the Constitution demanded that the highest court of the state address the points presented for reconsideration, a denial of which is a denial of a fundamental constitutional right.

Webb at 501. It is readily apparent that Haugen had asserted his constitutional right of due process claim at that time, for the record as a whole shows "clear intendment that this was done[.]" PruneYard at 946.

A review of the record shows that a majority of the points presented by Haugen on reconsideration coincide with the federal questions presented herein. The first three points raised on reconsideration encompassed the federal question regarding the court's failure to convey an accurate understanding and presentation of the language being construed by misstating the statutes using erroneous, omitted, and incomplete language. See App. E at 3b-8b. The fourth point raised on reconsideration encompassed the federal question regarding the court's failure to recognize and address an existing alternative definition provided by statute before it acted sua sponte and used a non-statutory definition. See id. at 8b-12b. The fourth point also contains the federal question regarding the separation of powers guaranteed by the Georgia Constitution. See id. at 10b. The next three points raised on reconsideration encompassed the federal question regarding the court's failure to address the actual controversies on appeal while it addressed an abandoned issue. See id. at 12b-15b.

This case is distinguishable from those cases in which this Court has determined that no federal questions existed. In Webb, this Court held that it lacked jurisdiction to review a state judgment when the petitioner had used the phrase "full faith and credit" several times in the proceedings below, but had never cited the federal Constitution or any of the cases relying on it. Webb at 501. In Adams v. Robertson, 520 U.S. 83 (1997), references to due process requirements in the brief submitted to the Alabama Supreme Court were insufficient to establish that they had fairly raised that issue in

the state court when the state court's decision did not address that issue.

Unlike Webb and Adams, the use of "fundamental fairness and substantial justice" was not used in passim. These terms were not invoked at all until the Motion for Reconsideration. Prior to this time, the Supreme Court of Georgia had not seen these terms of art. Such definite and limited use post hoc should have given the court cause for concern that unexpected federal questions had been raised. At minimum, the court was afforded a fair opportunity to address the questions; however, as a September term case, the court denied review by allowing it to expire at the last day of the January term as required by the Georgia Constitution. See OCGA § 15-2-4 ("the January term shall end on April 14"); see also GA. CONST. Art. 6, § 9, ¶ 2 ("The Supreme Court . . . shall dispose of every case at the term for which it is enter on the court's docket for hearing or at the next term.").

Probably the most distinguishing characteristic between the instant case and cases such as Webb and Adams is that the parties in those cases have had ample opportunity to raise federal questions; those parties did not face with a ten-day time constraint to file a Motion for Reconsideration as Haugen did. See GA. SUP. CT. R. 27.

3. The Primary and Fundamental Issue Before This Court Is Whether The Highest Court In A State Must Accord The Parties Due Process Of Law As Described Under *Brinkerhoff-Faris*.

The primary and fundamental issue before this Court is not whether the Supreme Court Georgia issued an erroneous decision on a question of state law. "A petition for a writ of certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the *misapplication* of a *properly* stated rule of law." SUP. CT. R. 10 (emphasis added).

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.
>
> Brinkerhoff-Faris at 680 (internal citations omitted).

The primary and fundamental issue in the instant case concerns the *application* of *improperly* stated law – not the *misapplication* of a *properly* stated rule of law of Rule 10.

"Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense-whether it has had an opportunity to present its case and be heard in its support." Brinkerhoff-Faris at 681. This Court's rightful concern should be whether Haugen has been accorded due process in another primary sense – whether he was afforded fundamental fairness and substantial justice. Moreover, this Court may also raise, sua sponte, a concern of whether his case and issues were ever heard at all given the misstatements of statutes, overlooked definitions, and misidentification of issues.

"Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review." Id. (internal citations omitted). In the instant case,

the power of the Supreme Court of Georgia to construe the SPLOST statutes and its power to re-examine the state cases cited do not raise federal questions, and neither is subject for this Court's review. However,

> while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him *some real opportunity* to protect it.

Brinkerhoff-Faris at 682 (emphasis added) (internal citations omitted).

From this simple and basic principle, the state action by highest court of the State of Georgia may not deprive Haugen of his right to seek a writ of mandamus to enforce Respondents' statutory duties with respect to the "excess proceeds," which the state of Georgia has no power to destroy, unless there was afforded to him *some real opportunity* to protect it through a fundamentally fair and substantially just adjudication. Given the misstatements of statutes, overlooked definitions, and misidentification of issues, Haugen had *no real opportunity*.

CONCLUSION

For any or all of foregoing reasons, Petitioner James L. Haugen respectfully requests that this honorable Court grant his petition for rehearing of his petition for writ of certiorari and take summary action at the appropriate time by granting his petition for writ of certiorari, simultaneously vacating the judgment below, and requiring such further proceedings as may be just under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, James L. Haugen, certify as follows:

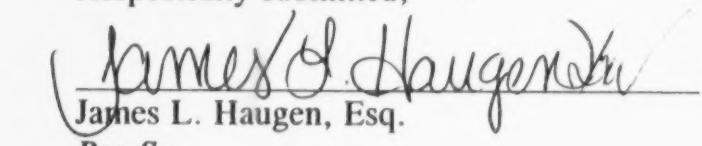
1. I am the Petitioner in this case. I prepared this Petition for Rehearing of Petition for Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial; or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

Dated: October 29, 2004

Respectfully submitted,



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APPENDIX E

IN THE SUPREME COURT STATE OF GEORGIA

No. S03A1444

[Filed March 11, 2004]

JAMES L. HAUGEN, Plaintiff/Appellant,	)
v.	)
HENRY COUNTY, GEORGIA, a political subdivision; and LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS, and LEE HOLMAN, Individually and as members of the Board of Commissioners of Henry County, Georgia, Defendants/Appellees.	)

MOTION FOR RECONSIDERATION AND ARGUMENT IN SUPPORT THEREOF, AND MOTION FOR HEARING

COMES NOW Appellant James L. Haugen, pursuant to Rule 27 of the Rules of the Supreme Court of Georgia, moves this Court to reconsider its Opinion of March 1, 2004,

affirming the trail court's Judgment that dismissed Appellant's actions seeking mandamus and injunctive relief. Attached hereto as Exhibit "A" is a copy of the Opinion.

In addition, pursuant to Rule 26 of the Rules of the Supreme Court of Georgia, Appellant moves this Court to hear the matters that are raised in the Motion for Reconsideration.

IN SUPPORT OF BOTH MOTIONS, Appellant submits the following argument:

INTRODUCTION

The Opinion in the above-stated matter is significant because it addresses two matters of first impression for this Court. The interpretation of OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2) is a matter of first impression for this Court. Also, the use of accrued interest from SPLOST proceeds is also a matter of first impression.[1] As matters of first impression, the Opinion must not confuse. It is imperative that the Opinion be clear and not want for clarity.

The Opinion is confusing, for it lacks crucial attention to critical details. It misstates statutory language, omits key statutory language, overlooks precedent, overlooks the totality of other SPLOST statutes, and overlooks material facts. Because there are many fatal discrepancies, fundamental

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[1] Neither party has raised an issue with respect to the use of accrued interest. The majority, sua sponte, included the use of accrued interest from SPLOST proceeds into its discussion although neither party has advocated a specific position. See Majority Op. at 4. Also, there is no statement in the Opinion that presents the fact that $4.6 million of accrued interest exists *in addition to and not part of* the $11.8 million of "excess proceeds" at issue.

fairness and substantial justice on behalf of Appellant demands this that Court GRANT this Motion for Reconsideration based on the discrepancies noted herein.

In addition, this Court's decision is premised on an issue abandoned by the Appellant. Long before the trial court rendered its Judgment, Appellant filed amended and supplemental pleadings that rejected the position "that, pursuant to OCGA § 48-8-121(g), any 'excess proceeds' must be used to reduce ad valorem taxes." Majority Op. at 1-2. Except for the initial pleading in the instant case, Appellant has not sought an Order to have "excess proceeds" used for "ad valorem tax reduction" pursuant to OCGA § 48-8-121(g)(2).

ARGUMENT IN SUPPORT OF MOTION FOR RECONSIDERATION

(1) The Opinion Misstates OCGA § 48-8-121(g)(2).

The Opinion states that "OCGA § 48-8-121(g)(2) provides, in relevant part, that the County can use such excess proceeds *only* to reduce ad valorem taxes." Majority Op. at 3 (emphasis added). **This is not correct**.

Code Section 48-8-121(g)(2) states, in relevant part, that "excess proceeds shall next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes." **The exclusionary term "only" does not appear at all in paragraph (2)**. The exclusionary term "solely" appears in the preceding sentence, but legislature did not include it here.

This significance of this misstatement is profound. Appearing in the first paragraph of Division 2, it sets the direction for the remainder of the Opinion. Just two sentences later at the end of the first paragraph, the Opinion frames the issue based on this false foundation. See Majority Op. at 4. The discussion that follows only magnifies the error. Determinations regarding "excess proceeds" and legislative intent are founded on this mistake of statutory law. Likewise, any "as a matter of law" decision is rooted on a defective premise making it fundamentally unsound and untrustworthy.

This significance of this misstatement is equally profound for the discussion that does not occur. Believing that the issue is limited to spending "excess proceeds" only for the purpose of ad valorem tax reduction, the Opinion fails to capture salient statutory provisions. Decisive language is omitted from some SPLOST statutes while a key statute is completely overlooked. By excluding critical statutory provisions from its discussion, the Opinion misses the totality of the SPLOST.

A reader who reads the first paragraph of Division 2 and compares its language of OCGA § 48-8-121(g)(2) will undoubtedly be confused from the start and ask, "What Code book was the Court reading from?" Appellant respectfully submits that this Court should avoid reader confusion, especially in matters of first impression, for it invites future litigation of the same statutory matter. Matters of first impression should not lack clarity and should not be based on erroneous statements of statutory law. Even if the matters presented were not those of first impression, this Court should not only reconsider its Opinion but also consider vacating Division 2 of the Opinion.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because the correct statutory language of OCGA § 48-8-121(g)(2) was not considered, and the mistake of statutory law permeates throughout the remainder of the Opinion.

(2) The Opinion Omits Key Statutory Language From OCGA § 48-8-121(g)(2).

The Opinion omits from its discussion of OCGA § 48-8-121(g)(2) the following language: "*excess proceeds shall* next be paid into the general fund of the county, it being the *intent* that any funds so paid into the general fund of the county. . . ." (emphasis added). There are two factors here that exacerbate the confusion.

First, the legislature's mandate of the use of "excess proceeds" is clear and unambiguous, i.e., a payment to the general fund is required. See Majority Op. at 6 (noting the term "shall" is a clear and unambiguous term). The Opinion does not discuss this clear legislative mandate.

Second, the Opinion purports to determine legislative *intent* in the application of *excess proceeds*. See Majority Op. at 4-8. However, **the Opinion's discussion of the legislature's intent of "excess proceeds" does not include the very phrase in which the legislature expressed its intent of "excess proceeds."**

A reader of this Court's Opinion, who realizes the omission, will wonder why a discussion of "excess proceeds" did not include the "general fund" language. The reader's confusion will only be exacerbated when the Opinion, which professes to address the legislative "intent" of "excess proceeds," fails to include the statutory expressions of

"intent" and "excess proceeds" that appear in the very same sentence. It is respectfully suggested that this Court should consider deeming this Opinion as unacceptable, even if it were not a matter of first impression.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because the full statutory language of OCGA § 48-8-121(g)(2) was not given consideration.

(3) The Opinion Omits Key Statutory Language From OCGA § 48-8-121(g)(1)(B) And Overlooks The Precedence Of *Gearinger*.

The Opinion includes a partial quote of OCGA § 48-8-121(g)(1)(B) but omits key statutory language which frames the true context. Code Section 48-8-121(g)(1)(B) states the following:

> *If* the county receives from the tax net proceeds in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax *or* in excess of the actual cost of such project or projects, *then such excess proceeds shall be subject to and applied* as provided in paragraph (2) of this subsection. (emphasis added).

The conjunction "if" that precedes the conjunction "or" was not mentioned in the discussion. The natural meaning of "if" is "on condition that; in case that; supposing that." Webster's New World Dictionary, Third College Edition (1991). As a result, key statutory language – which changes the context from one being phrased as a *connective* (marking a *choice*) to one being phrased in the *disjunctive* (marking a *condition*) – has been omitted.

The Opinion does not consider the "if-then" disjunctive phrasing. Had it been considered, the Opinion would likely have shifted its discussion to determine whether the "if-then" disjunctive phrasing truly marks a condition upon which the legislature clearly and unambiguously subjects and applies "excess proceeds" to the payment to the general fund of the county. See Majority Op. at 6 (noting the term "shall" is a clear and unambiguous term). Consequently, the Opinion lacks the minimal contextual accuracy especially necessary for a matter of first impression because the context of a condition preceding a clear and unambiguous mandate is neither disclosed nor discussed.

The Opinion provides a definition for the conjunction "or" as meaning a choice or an election to do one of two things with this Court's own holding in Gearinger v. Lee, 266 Ga. 167 (1996). Majority Op. at 4. While this is accurate, it does not include the very next sentence of Gearinger which states that "[w]hile the word 'or' can be interpreted either as a disjunctive term or as a reiterative term, where a legislative provision is phrased in the disjunctive, *it must be so construed* absent a clear indication that a disjunctive construction is contrary to the legislative intent." Gearinger at 169 (emphasis added) (internal citation omitted). This Court was unanimous in Gearinger, so its holding provides incontrovertible case precedence.

Following the analytical discussion of Gearinger, the meaning of "or" in the instant case should have been construed in the disjunctive rather than in the elective absent a clear indication that it is contrary to legislative intent. Because Appellant has demonstrated herein that the Opinion misstates and omits statutory law (e.g., the terms "intent" and "excess proceeds" appearing in the same sentence but not in a discussion purporting to determine legislative intent of the

same terms), it does not provide a credible argument that clearly indicates the legislature intended any interpretation but a disjunctive construction. Consequently, the Opinion would likely demand a different conclusion had the key language from Gearinger had not been overlooked.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because the "if-then" disjunctive phrasing of OCGA § 48-8-121(g)(1)(B) was not considered, and a Gearinger analysis was not conducted.

(4) The Opinion Overlooks OCGA § 48-8-111(a)(3) Which Unveils The Key To Determining Legislative Intent of OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2).

The Opinion correctly states that "OCGA § 48-8-121(g)(1)(B) does not stand in isolation." Majority Op. at 6. However, it did not consider the following language of OCGA § 48-8-111(a)(3): "[t]he maximum cost of the project or projects which will be funded from the proceeds of the tax, which *maximum cost shall also be the maximum amount of net proceeds to be raised by the tax*." See Appellant's Brief at 22 (emphasis added).

The Opinion misses the determinative fact that "maximum cost" is also "the maximum amount of net proceeds to be raised by the tax." By placing the "maximum cost" and "maximum amount" provisions within the same sentence with clear and unambiguous language, the General Assembly defines not only the county's power to tax but also its power to spend. See Majority Op. at 6 (noting the term "shall" is a clear and unambiguous term). Appellant respectfully submits that it was not necessary for the Opinion to create a third definition of "estimated cost" to understand legislative intent. See Majority Op. at 4-8. **Code Section 48-8-111(a)(3)**

unveils the key to understanding the legislative intent of OCGA § 48-8-121(g)(1)(B) and -121(g)(2).

Had the Opinion recognized the existence of this definition, the totality of the SPLOST would have been clearly come into view. The county determines a *maximum amount* through estimates – and *not an estimated amount of costs*. Cf. Majority Op. at 4-8. This *maximum amount of net proceeds to be raised by the tax* is also *the maximum cost of projects which will be funded*. Net proceeds collected above the maximum amount to be raised are "excess" and defined in OCGA § 48-8-121(g)(1)(B) as "excess proceeds." As "excess proceeds," amounts above the maximum amount to be raised must be paid to the general fund of the county, where the county may spend such proceeds from the general fund in any lawful manner. The legislature recommended that the county use such proceeds to reduce ad valorem taxes but held short of mandating such use, thereby allowing the county discretionary use of such proceeds from the general fund only. The totality of the SPLOST reveals the simplicity of "excess proceeds."

The Appellees also defined "maximum cost" to mean "the maximum amount of net proceeds to be raised by the tax". Paragraph 5 of Resolution 96-14, the resolution that called for the referendum in which the voters of Henry County ultimately enabled the SPLOST, is patterned after OCGA 48-8-111(a)(3). Majority Op. at 1; Appellant's Brief at 2. "Paragraph 5 states that '[t]he maximum cost of the projects which will be funded from the proceeds of the tax, which *maximum cost shall also be the maximum amount of the net proceeds to be raised by the tax, shall be sixty million dollars*.'" Appellant's Brief at 3 (emphasis added). **As authorized by the General Assembly, Appellees defined $60 million as the upper limits of both their power to tax**

and power to spend. Appellees have not been empowered by the General Assembly to spend beyond $60 million.[2]

When viewed in toto and not in isolation, OCGA §§ 48-8-111(a)(3), -121(g)(1)(B), and -121(g)(2) provide the means with which the legislature limits the county's power to tax and their power to spend. The county has never been authorized to spend from the SPLOST account above the maximum amount from the first day of the tax. Clearly, the legislative purpose of OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2) is to prevent the county from spending "excess proceeds" from the SPLOST account by mandating payment of "excess proceeds" into the general fund. Because the Opinion holds otherwise, it appears that this Court may have impermissibly usurped the General Assembly's inherent taxation power that limits "maximum costs" to the "maximum amount of net proceeds to be raised by the tax." See GA CONST. Art I, § 2, ¶ 3; GA CONST., Art. 7, § 3, ¶ 1.

With regards to the "excess proceeds" of the instant case, the Opinion has adopted a position not previously advocated by the Appellees nor subjected to Appellant scrutiny. The Opinion removes the statutory term "maximum" and refocuses the remainder of its discussion with non-synonymous terms "estimate" and "estimated" – terms that appear nowhere in the statutes of the instant case but used eleven times by the majority. The Opinion introduces these terms by stating "[t]he determinative factors are the *estimated* and the actual costs of the project," follows by using "estimated" three times in the next four sentences, and then begins the very next paragraph by declaring that "[t]here is

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[2] The power to tax and power to spend flows from the General Assembly (legislative branch) – not from the Department of Revenue (executive branch).

nothing in the statute to support the conclusion that the *estimated cost* invariably controls over actual cost." Majority Op. at 4-5 (emphasis added). Such declaration, however, overlooks that the fact that "estimated" does not appear in the statute. It is evident that the reason why there is no statutory support of "actual cost" controlling over "estimated cost" is that there is no "estimated cost" in the statute, but that it was just introduced in the preceding paragraph. When applied to Appellant scrutiny, it is respectfully submitted for this Court's consideration that new terms of art are not necessary when existing ones will suffice, especially when the existing ones have been defined by the General Assembly.

There is support to conclude that "maximum cost" controls over "actual cost," and this support is clear and absolute. As the legislative means to limit county spending from the SPLOST account, "maximum cost" is the "the maximum amount of net proceeds to be raised by the tax." As previously stated, OCGA §§ 48-8-111(a)(3), -121(g)(1)(B), and -121(g)(2) provide the mechanism with which the legislature limits the Appellees' powers to spend. When read in conjunction with one another, the construction of these statutes "square with common sense and sound reasoning." Cf. Majority Op. at 5. From day one, Appellees have never been authorized to spend from the SPLOST account above the maximum amount of $60 million. In addition, this does not "result in unreasonable consequences or absurd results not contemplated by the legislature." Majority Op. at 7. The General Assembly clearly intended to limit the county's power to spend from the SPLOST account by using "maximum cost" in OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2).

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because the Opinion

overlooks OCGA § 48-8-111(a)(3) which, if applied at all, would certainly demand a different holding in the instant case.

(5) Appellant Did Not Advocate On Appeal That "Ad Valorem Tax Reduction" Was A Matter Under OCGA § 48-8-121(g).

Appellant did not advocate to this Court on appeal "that, pursuant to OCGA § 48-8-121(g), any 'excess proceeds' must be used to reduce ad valorem taxes." Majority Op. at 1-2. The Opinion does not state that Appellant retracted this claim through later pleadings. Because the Opinion presented this as an issue, it confounds the true issues presented on appeal.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because the Opinion not only presented a non-issue but also addressed it.

(6) The Issue Concerning Appellees' Duties Under OCGA § 48-8-121(g) Was Not Addressed.

Appellant presented to this Court on appeal an issue involving Appellees' duties to comply with OCGA § 48-8-121(g)(1)(B) and -121(g)(2), but the Opinion did not address the issue of "excess proceeds" being paid to the general fund of the county. Appellant filed an Amended Proposed Judgment as an attachment to Plaintiff's Amended Motion for Findings of Fact and Conclusions of Law on January 30, 2003.[3] (R.356, 359). In this pleading, Appellant requested the trial court to find that "defendants [Appellees] have the

[3] Although not indicated in the Record, Judge McConnell had verbally requested that both parties prepare and submit proposed Orders/Judgments during a telephone conversation with Appellant who, in turn, notified Appellees.

statutory duty to pay the 'excess proceeds' in the amount of $11,877,176 into the general fund of Henry County" under OCGA § 48-8-121(g)(2). (R.375). Later in the same document, Appellant requested the trial court to issue the following order: "WHEREAS, in accordance with OCGA § 48-8-121(g)(2) . . . said "excess proceeds" in the amount of $11,877,176 shall be paid into the general fund of Henry County." (R.385).

In Enumeration III of his Brief, Appellant claimed that "the trial court ERRED by failing to construe correctly OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2)" and that Appellees have "the duty to pay the 'excess proceeds' in the amount of $11,877,176 into the general fund of the county pursuant to OCGA § 48-8-121(g)(2)." Appellant's Brief at 19.

The Opinion has not addressed this issue. With respect to OCGA § 48-8-121(g), the Opinion has misstated statutory language, omitted key statutory language, overlooked precedent, and overlooked the totality of the SPLOST. There was no mention of the general fund or the clear and unambiguous mandate of the legislature to pay "excess proceeds" to the general fund.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration to address the issues of OCGA § 48-8-121(g) as presented on appeal.

(7) <u>The Issue Concerning Appellees' Duties Under OCGA § 48-8-121(a) Was Not Addressed</u>.

Appellant presented to this Court on appeal an issue involving Appellees' duties to comply with Paragraph 8 of the Resolution pursuant to OCGA § 48-8-121(a), but the Opinion

did not address it. In Appellant's Amended Proposed Judgment filed with the trial court, Appellant requested the trial court to find "that, under OCGA § 48-8-121(a)(1), defendants' [sic] [Appellees] have the statutory duty to use proceeds of the SPLOST exclusively for the *purposes specified in the Resolution*" and "that, under OCGA § 48-8-121(a)(1), defendants are not authorized to use proceeds from the SPLOST tax for a *purpose entirely different* from that contained in the Resolution." (R.377). Later in the same document, Appellant requested the trial court to issue the following orders: "WHEREAS, in accordance with OCGA § 48-8-121(a)(1) . . . said 'excess proceeds' in the amount of $11,877,176 shall be used exclusively for the purpose specified in the Resolution" and "WHEREAS, in accordance with Paragraph 8 of the Resolution, said 'excess proceeds' in the amount of $11,877,176 shall be used exclusively for the purpose of reducing ad valorem taxes." (R.385).

In Enumeration IV of his Brief, Appellant asserted that "the trial court ERRED by incorrectly construing OCGA §§ 48-8-121(a)(1)." Appellant's Brief at 23. Appellant further asserted that, pursuant to OCGA § 48-8-121(a)(1), Appellees have "the lawful duty to comply with the terms and conditions of the Resolution. . . . Specific to the facts of the instant case [only, Appellees have] the statutory duty to use 'excess proceeds' in the amount of $11,877,176 exclusively for [the] purpose of ad valorem tax reduction pursuant to Paragraph 8 of the Resolution." Id. at 23-24.

The Opinion has not addressed this issue. With respect to Appellees' duties to comply with Paragraph 8 of the Resolution pursuant to OCGA § 48-8-121(a), the language of Paragraph 8 was not presented. Nevertheless, any determination of "excess proceeds" and legislative history in

the Opinion has been shown herein to be fundamentally flawed and not trustworthy.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration to address the issues of OCGA § 48-8-121(a) as presented on appeal.

(8) The Issue Concerning The Applicability And Relevancy Of *Dickey v. Storey* Was Not Addressed.

Appellant presented to this Court on appeal an issue involving the applicability of Dickey v. Storey, 262 Ga. 452 (1992), but the Opinion did not address it. In Appellant's Amended Proposed Judgment filed with the trial court, Appellant requested the trial court to find "the holding of Dickey does not apply to the instant case." (R.374).

In Enumeration V of his Brief, Appellant asserted that "the trial court ERRED by failing to determine the applicability or relevancy of Dickey." Appellant's Brief at 27.

Although the Opinion presents the holding of Dickey, it was only was applied within the context of determining legislature intent. However, any determination of legislative history has been shown herein to be fundamentally flawed and not trustworthy. In addition, there is no determinative reasoning of why Dickey applies in cases of "excess proceeds" and why this Court's language of Dickey supercedes the statutory language of OCGA § 48-8-121(a), i.e., why this Court replaces *purposes* with *projects*. Therefore, this issue has not been addressed.

Appellant respectfully requests this Court GRANT his Motion for Reconsideration to address the issue of Dickey as presented on appeal.

(9) This Court Has Raised The Issue Of The Use Of Accrued Interest From SPLOST Proceeds As A Matter Of First Impression.

The Opinion indicates the presence of accrued interest and includes it as part of the issue. Majority Op. at 4. The presence of accrued interest is significant, and the amount of accrued interest is significant; however, Appellees' ability to spend accrued interest under the SPLOST statutes of OCGA § 48-8-110 et seq is a separate issue that neither party has raised in the instant case. Consequently, no argument with respect to accrued interest – how it is treated within the SPLOST statutory scheme and whether it is rightfully considered as "excess proceeds" – has been presented to this Court.

The Opinion does not present the details of the dollar figures involved, i.e., the actual amounts. The Record and the briefs of both parties indicate that the total amount of the SPLOST budget was $76.4 million, reflecting accrued interest in the amount of $4.6 million *in addition to* the amount of $71.8 million being generated by the tax in which $60 million was the maximum amount to be raised.[4] (Appellant's Brief at 2; Appellees' Brief at 3; R.163).

Appellant contends that accrued interest does not fall within the definition of "excess proceeds" of OCGA 48-8-121(g)(1)(B). In fact, the legislature is silent with regard to

---

[4] The actual amount of accrued interest is as stated is $4,542,476.

how the net proceeds collected from the SPLOST are stored or invested before expenditures are made on projects. The Appellant asserts that the statutory silence equals discretionary authority, and as such, the legislature intended accrued interest to be a discretionary use of the Appellees and available for use from the SPLOST account for SPLOST projects. Because the spending of accrued interest is a matter of discretion, Appellant intentionally excluded accrued interest and any pro rata share earned on "excess proceeds" because mandamus is not available where the duty in question is discretionary.

Accordingly, the Opinion should have held that accrued interest does not fall within the definition of "excess proceeds" and may remain in the SPLOST account, and that any amount of accrued interest, including any pro rata share earned on "excess proceeds," may be used for SPLOST projects because the spending of accrued interest falls within the discretionary use of the Appellees.

Appellant respectfully requests this Court GRANT his Motion for Reconsideration because neither party argued for the inclusion of "accrued interest" as "excess proceeds" and because the actual amounts involved were not disclosed.

(10) The Opinion Overlooks Material Facts.

The Opinion briefly mentions the presence of accrued interest. As discussed in the preceding section herein, the total amount of the SPLOST budget was $76.4 million, reflecting accrued interest in the amount of $4.6 million *in addition to* the amount of $71.8 million being generated by the tax.

The availability of accrued interest and the actual amount involved are significant. Because "the use of accrued interest" appears to be a discretionary use of the Appellees, the legislature permits "the use of accrued interest" to offset the valid concerns addressed by the majority, i.e., the effects of inflation, low cost estimates, and other variable affecting actual costs. See Majority Op. at 7-8.

Second, no evidentiary hearing was held by the trial court. The Opinion's statements of facts are based solely on two affidavits. In addition, the facts presented in the Opinion are both incomplete and vague.

The Opinion overlooks the fact that "approximately $60 million of the $76,419,652 [which includes accrued interest] had been spent and/or encumbered from funds in the SPLOST account" as of October 22, 2002 which is after suit was filed. Appellant's Brief at 2. Also, the Opinion does not include the fact that projects are either "uncompleted *and/or are ongoing*[.]" Id. (emphasis added). Because some projects are ongoing and others are uncompleted, it is obvious that projects that are uncompleted have not even begun construction. The terms "uncompleted," "incomplete," and "unfinished" appearing in the Opinion are based solely from affidavits and not from an evidentiary hearing. Cf. Majority Op. at 7-8.

Any conclusion which portrays an abandonment of projects as waste is far from certain based on the facts presented in the Opinion. Appellant respectfully submits to this Court that there were will be no unfinished monuments of bricks and mortar wasting away in Henry County, and the facts as presented in the Opinion support this statement. Appellees did not assert "waste" as a defense in their Answer, and Appellees have not made any definite assertions that

specific projects will be forfeited. (R.156-160). In fact, Appellees have not responded to the following argument presented to the trial court:

> If projects do not get funded as a result of the defendants [Appellees] complying with the law, it will be the abandonment of *plans* for projects – not *actual and/or encumbered* projects. Waste is not an issue. At the present time, defendants' [Appellees'] affiant states that the SPLOST has generated over $76 million, and "Henry County has spent and/or encumbered approximately 60 million dollars to date to complete the SPLOST projects on the SPLOST projects list."

(R.310) (emphases in original).

Appellees seemed to have continually relied on the vague and over-broad terms; however, questions of fact still remain that should be resolved by a trial court.

Third, the Opinion overlooks the fact that net proceeds from SPLOST 2002 are presently being collected, wherein an estimated $140 million will likely be raised. Appellant's Brief at 3-4. The resolution of SPLOST 2002, Resolution No. 02-37, is part of the Record. (R.328-341).

When the terms and conditions of Resolution No. 02-37 are considered, this Court can easily conclude that it is sufficiently broad to incorporate precluded projects, and this Court should hold that Appellees have the discretion to transfer projects precluded from the SPLOST of the instant case to SPLOST 2002 based on the language of Resolution 02-37.

Accordingly, Appellant respectfully requests this Court GRANT his Motion for Reconsideration because accrued interest is available for Appellees' use, questions of fact still remain, and Appellees' have the discretion to fund precluded projects with SPLOST 2002 proceeds given the broad terms and conditions of Resolution 02-37.

WHEREFORE, based upon the foregoing discussion, Appellant has demonstrated to this Court that its Opinion of March 1, 2004 has misstated statutory language, omitted statutory language, overlooked case precedent, overlooked other statutes, and overlooked issues presented on appeal that have not been addressed. Appellant has demonstrated to this Court a substantial level of knowledge regarding the issues of before this Court. Appellant is citizen of the State of Georgia who has demonstrated a citizen's will to ensure that Appellees, who are the publicly-elected officials of Henry County and custodians of the citizens' tax contributions, do not over-extend the power to spend authorized by the General Assembly and enabled by the citizen voters of Henry County.

Because the Opinion contains fatal discrepancies, Appellant James L. Haugen respectfully requests, and fundamental fairness and substantial justice demands, that this Court:

(a) GRANT Appellant's Motion to Reconsider of this Court Opinion of March 1, 2004;

(c) RECONSIDER the four issues enumerated below;

(c) VACATE Division 2 of this Court's Opinion;

(d) VACATE this Court's decision in its entirety, but preserve the holding of Division 1 and the holding

that Jackson v. Shadix is not applicable to the substantive issues of the SPLOST of the instant case; and/or

(e) GRANT any such other and further relief that may seem just and proper to this Court.

FURTHERMORE, it will likely be advantageous to the members of this Court to hear from both Appellant and Appellees regarding the issues addressed herein. Although Appellant believed that this matter could be easily decided on the Record and that this Court should not be burdened to hear oral arguments, Appellant could neither have anticipated nor appreciated the divisiveness that has resulted between the majority and dissent. There appear to be underlying concerns that cannot be adequately addressed on paper. Also, the points raised herein may have raised new concerns.

Throughout his research, Appellant has gained considerable knowledge with respect to legislative and statutory history of the SPLOST. Appellant has demonstrated to both this Court and the trial court a substantial level of knowledge regarding the issues of before this Court. However, demonstrating knowledge on paper is limited, and the ability to address all foreseeable issues regarding specific matters would take more pages than the Rules prescribe. In addition, Appellant has had to address the other issues of mandamus procedure and inapplicable case law, and this Court has rightfully sided with the Appellant on those issues. Appellant believes that an oral hearing on the Motion for Reconsideration would be advantageous and may provide insight to the members of this Court. It would be beneficial for this Court to hear from Appellant and Appellees on the remaining issues identified in the Motion for Reconsideration and any questions of fact.

Accordingly, Appellant James L. Haugen respectfully requests, and fundamental fairness and substantial justice demands, that this Court:

(a) GRANT Appellant's Motion for Hearing so that both Appellant and Appellees may address the points stated in the Motion for Reconsideration and any concerns of the members of this Court.[5]

FURTHERMORE, upon Reconsideration, Appellant respectfully submits the following issues that were presented but not addressed on appeal.

Appellant James L. Haugen respectfully requests, and fundamental fairness and substantial justice demands, that this Court ADDRESS the following issues on Reconsideration:

1. As a matter of first impression, whether accrued interest earned on net proceeds of the SPLOST – including any interest earned on "excess proceeds" – is considered "excess proceeds" as defined by OCGA § 48-8-121(g)(1)(b)? If not, does the expenditure of said accrued interest fall within the discretionary use of the Appellees and available for SPLOST projects?

2. As a matter of first impression, whether Appellees have the duty to pay the "excess proceeds" of the SPLOST to the general fund of the county pursuant to OCGA § 48-8-121(g)(1)(b) and –121(g)(2)?

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[5] Upon a reasonable short notice of appearance, Appellant is available to discuss the issues addressed in the Motion for Reconsideration in a hearing.

3. As a matter specific to the facts of the instant case only, whether Appellees have the duty to use the "excess proceeds" of the SPLOST exclusively for the purpose specified in Paragraph 8 of the Resolution pursuant to OCGA § 48-8-121(a)(1) where Paragraph 8 states that "excess proceeds shall be paid into the general fund of the county and shall be used for the purpose of reducing ad valorem taxes"? (emphasis in original).

4. Whether the holding of Dickey v. Storey applies in issues involving "excess proceeds"?

FURTHERMORE, upon Reconsideration of the preceding issues and based on the arguments stated herein, the arguments stated in the Briefs presented to this Court on appeal, and any arguments that may be presented in an oral hearing, Appellant James L. Haugen respectfully requests this Court to:

(a) REVERSE the trial court's denial of his request for mandamus relief,

(b) REVERSE the trial court's denial of his request for injunctive relief,

(c) REVERSE the trial court's grant of judgment in favor of the Board in its Order,

(d) REMAND this matter to the trial court and DIRECT the trial court to issue mandamus relief compelling the Board to perform its lawful duties in accordance with the foregoing discussion,

(e) REMAND this matter back to the trial court for further proceedings,

(f) GRANT recovery of all costs associated with the trial court,

(g) GRANT recovery of all costs associated with the instant appeal,

(h) GRANT recovery of all costs associated with the Emergency Motion To Stay, Haugen v. Henry County, S03M1039 (Ga. filed April 1, 2003), and/or

(i) GRANT any such other and further relief that may seem just and proper to this Court.

This _____ day of March, 2004.

Respectfully Submitted,

/s/_____
James L. Haugen
Pro Se

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CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing "Motion For Reconsideration And Argument In Support Thereof, And Motion For Hearing" upon counsel of Appellees by depositing a copy of same in the United States mail, first class, with sufficient postage thereon to insure delivery addressed to the following:

Michael A. O'Quinn, Esq.
O'Quinn & Cronin
21 Sims Street
McDonough, GA 30253

This _____ day of March, 2004.

Respectfully Submitted,

/s/_____
James L. Haugen
Pro Se

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APPENDIX F

IN THE SUPREME COURT
STATE OF GEORGIA

No. S03A1444

[Filed July 7, 2003]

JAMES L. HAUGEN,
Plaintiff/Appellant,

v.

HENRY COUNTY, GEORGIA,
a political subdivision; and
LELAND MADDOX, WARREN HOLDER,
GARY FREEDMAN, JASON HARPER,
GERRY ADAMS, and LEE HOLMAN,
Individually and as members of the Board of
Commissioners of Henry County, Georgia,
Defendants/Appellees.

BRIEF OF APPELLANT

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PART ONE
TYPE OF CASE AND THE JUDGMENT APPEALED

Appellant filed a mandamus action in the Superior Court of Henry County seeking to compel Appellees herein to use $11,877,176, the amount of net proceeds received in excess the maximum cost of projects of $60 million, pursuant to statutory provisions of the special sales and use tax commonly known as Special Purposes Local Option Sales Tax (hereinafter, "SPLOST") as authorized by OCGA § 48-8-110 et seq. Appellant also filed for temporary and permanent injunctive relief seeking to prevent Appellees' use of the "excess proceeds" in a manner contrary to SPLOST statutes. During a hearing held on March 7, 2003, the trial court indicated that it would rule in favor of Appellees; Appellant requested temporary injunctive relief to stay the trial court's decision while Appellant appealed the trial court's decision.

The trial court denied Appellant's request for mandamus and injunctive relief, and granted judgment in favor of Appellees in an Order signed March 13, 2003 and filed March 31, 2003. The trial court also denied Appellant's request for stay during the hearing.

This appeal arises from the trial court's Order denying Appellant's request for mandamus and injunctive relief, and the granting judgment in favor of the Appellees.

STATEMENT OF FACTS AND PROCEEDINGS

Appellant James L. Haugen is a citizen, taxpayer, and resident of Henry County, Georgia. Appellees are the Board of Commissioners of Henry County, Georgia, the duly elected and qualified governing body of Henry County, Georgia; Henry County, a political subdivision of the State of Georgia;

and Leland Maddox, Warren Holder, Gary Freedman, Jason Harper, Gerry Adams, and Lee Holman,[1] each of whom stand individually and as a member of the Board of Commissioners of Henry County (collectively, hereinafter, "the Board").

A. Enactment Of The SPLOST And The Proceeds Therefrom.

On August 5, 1996, the Board passed Resolution No. 96-14 (hereinafter, "Resolution") that called for a referendum and voter approval to impose a SPLOST within Henry County. (R.76-83). A referendum was held on September 17, 1996, and more than one-half of the votes cast were in favor of imposing the SPLOST. (R..61, ¶ 7).

The tax was imposed, and for the sixty-two month period between March 1997 and April 2002, the State of Georgia Revenue Commissioner disbursed net proceeds in the amount of $71,877,176 to Henry County, $11,877,176 in excess of the maximum costs of projects of $60 million. (R.62-63, ¶ 12). Because of accrued interest, the total amount in the SPLOST budget was $76,419,652 according to the Independent Accountant's Report dated May 30, 2002. (Id.; R.85-93). The Report groups projects into three categories: Building Projects, Road Improvements, and Contingency Accounts. (R.85-93). The Report does not contain an entry indicating that "excess proceeds" have been or will be scheduled to the general fund of the county. (R.85-93). Also, the Report contains no entries indicating that "excess proceeds" have been or will be scheduled for the purpose of ad valorem tax reduction. (R.85-93).

---

[1] Appellees Gerry Adams and Lee Holman were added as parties on March 7, 2003, and Phil Crosby and Nita Spraggins were dropped.

As of October 22, 2002, approximately $60 million of the $76,419,652 had been spent and/or encumbered from funds in the SPLOST account. (R.267, ¶ 14). Numerous projects listed in the SPLOST budget and account reports remain uncompleted and/or are ongoing, and it is estimated that it will cost approximately $27.5 to $27.9 million to complete the road and street paving projects alone, exceeding the total amount of SPLOST funds. (R.266, ¶¶ 8, 10).

B. Resolution 96-14 And The Specific Provisions Therein.

Paragraph 5 of the Resolution provides that "[t]he maximum cost of the projects which will be funded from the proceeds of the tax, which maximum cost shall also be the maximum amount of net proceeds to be raised by the tax, shall be sixty millions dollars." (R.80, ¶ 5). Paragraph 7 of the Resolution provides, in part, that "[i]f the tax imposed hereby is approved by more than one-half of the voters at the special election as provided by law, the proceeds received from the tax shall be used by the county exclusively for the purposes specified in this resolution. . . ." (R.81-82, ¶ 7).

In Paragraph 8, the Resolution specifically states that

> [i]f the county receives from the tax net proceeds in excess of the maximum cost of the projects stated in this resolution or in excess of the actual cost of such projects, then such excess proceeds shall be used solely for the purpose of reducing any indebtedness of the county other than bonded indebtedness and, if there is no such other indebtedness, or if the excess proceeds exceed the amount of any such other indebtedness, then the excess proceeds shall next be

> paid into the general fund of the county and shall be used for the purpose of reducing ad valorem taxes.

(R.82, ¶ 8) (emphasis not added).

The Resolution does not specify the use of "Contingency Accounts." (R.76-83).

C. The Board's Understanding Of The Duration Of The SPLOST Changed After *Jackson v. Shadix*, And Subsequent Actions Were Taken

The Resolution provided that the duration of the SPLOST "shall be five calendar years unless the maximum net proceeds [of $60 million] . . . is raised in a shorter time." (R.78, ¶ 8). However, after this Court's decision in Jackson v. Shadix, 272 Ga. 631 (2000), a new understanding of the duration had developed according to a newspaper report of August 15, 2000. (R.94-96). It was reported that "the Georgia Supreme Court ruled that the time element, not the dollar cap, dictated how long a county could continue to collect SPLOST funds." (R.95). Appellee Commissioner Gary Freedman was quoted as saying that "'[t]here *were* two provisions in the SPLOST program – five years and $60 million. The five years is the controlling provision.'" (R.95) (emphasis added).

Thereafter, the Board received recommendations from the SPLOST Oversight Committee. (R.99). On September 18, 2000, the committee recommended SPLOST funds be collected for the entire five year period rather than allowing the tax to sunset when $60 million is collected. (R.99). It was estimated that an additional $10 million would be collected. (R.99). The Committee recommended that each of the county's five commission districts be designated to use

$1 million from the additional funds, with the remaining $5 million being designated for county-wide projects included in the SPLOST program. (R.99).

On December 18, 2000, the Board implemented these recommendations and approved using $4.66 million toward four county-wide projects. (R.101-102, 104). On November 19, 2001, the Board created five Contingency Accounts and voted to allocate each commissioner $1 million. (R.111-112). The Board created a sixth Contingency Account for the Chairman of the Board and voted to allocate it $1 million on March 18, 2002. (R.116-118).

Of the $6 million allocated to Contingency Accounts, the Independent Accountant's Report indicates that $39,123 was expended through May 30, 2002. (R.93).

D. The Board's Actions To Continue The SPLOST And Resolution 02-37.

Prior to the expiration of the SPLOST, the Board attempted to continue the tax but failed. On September 18, 2001, voters rejected the continuation of the tax. (R.66, ¶ 19). The Board made a another attempt to implement the tax by passing Resolution No. 02-37 on August 27, 2002, which called for a referendum and voter approval to impose the tax within Henry County. (R.328-341). On the recommendation of counsel, the language of Resolution 02-37 was intentionally limited to only those items required by state law. (R.352, 354).

On November 5, 2002, voters passed a new tax (hereinafter, "SPLOST 2002"). (R.324, ¶ 34). No more than $140 million is planned to be raised for a period of time beginning April 1, 2003, and continue for a period not to

exceed 20 consecutive calendar quarters (five years) thereafter under SPLOST 2002. (R.332). Of this $140 million, a maximum cost of $46,508,283 was set for capital outlay projects (other than road, street and bridge purposes), and a maximum cost of $93,491,717 was set for road, street and bridge purposes. (R.332).

E. Procedural Posture.

Haugen filed a mandamus action seeking to compel the Board to use the amount of net proceeds received in excess the maximum cost of $60 million pursuant to SPLOST statutory provisions.[2] (R.11-30). Haugen also filed for temporary and permanent injunctive relief seeking to prevent the Board's use of the "excess proceeds" of $11,877,176 in a manner contrary to SPLOST statutes. (R.59-74). On March 7, 2003, Haugen requested temporary injunctive relief during a hearing to stay the trial court's forthcoming decision in favor of the Board while he appealed, but this was denied. See Haugen v. Henry County, S03M1039, p.11, ¶ 32 (Ga. filed April 1, 2003).

The trial court denied Haugen's request for mandamus and injunctive relief, and granted judgment in favor of the Board in its Order signed March 13, 2003 and filed March 31, 2003. (R.407-414). Haugen appeals the trial court's Order by filing a Notice of Appeal on March 31, 2003. (R.1-2).

On April 1, 2003, Haugen filed an Emergency Motion to Stay with this Court seeking injunctive relief during the pendency of the appeal. See Haugen. This motion was denied on April 7, 2003.

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[2] Each Appellee was served with summons pursuant to the Civil Practice Act in lieu of a mandamus nisi. (R.3-10).

ENUMERATION OF ERRORS AND JURISDICTIONAL STATEMENT

I. The Trial Court Erred by Failing To Recognize The Applicability Of The Civil Practice Act For Mandamus Actions.

II. The Trial Court Erred by Failing To Analyze Correctly The Validity and Applicability of the *Shadix* Holdings To The Instant Case.

III. The Trial Court Erred By Failing To Construe Correctly OCGA §§ 48-8-121(g)(1)(B) And -121(g)(2).

IV. The Trial Court Erred By Incorrectly Construing OCGA § 48-8-121(a)(1).

V. The Trial Court Erred By Failing To Determine The Applicability Or Relevance of *Dickey v. Storey*.

VI. The Trial Court Erred By Denying Injunctive Relief.

The Supreme Court, rather than the Court of Appeals, has jurisdiction of this case as a direct appeal pursuant to OCGA § 9-6-28.

PART TWO

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THE APPLICABILITY OF THE CIVIL PRACTICE ACT FOR MANDAMUS ACTIONS.

The Order of the instant case fails to recognize DeKalb County v. Chapel Hill, Inc., 232 Ga. 238 (1974), which held that the service provisions under the Civil Practice Act provide a viable alternative procedure to that of present-day OCGA § 9-6-27.

A. *Chapel Hill* Permits Ordinary Process For Mandamus Actions.

This Court in Chapel Hill unanimously held that the use of ordinary process under the Civil Practice Act is permitted in mandamus cases. The appellants in Chapel Hill argued that the case should have been dismissed "on the grounds that a mandamus nisi had not been granted or served . . . as required by Code § 64-107 [now OCGA § 9-6-27]." Id. at 239-40. This Court, however, held that Code Ann. § 81A-104 [now OCGA § 9-11-4(k)] "plainly permits ordinary process to be used in mandamus cases." Id. at 240. Clearly, the absence of the mandamus nisi is no longer fatal, and the use of ordinary process in the instant case is a statutory alternative permitted by the legislature under the Civil Practice Act.

B. *Inquiry Concerning A Judge* Requires Notice And Hearing – Not Mandamus Nisi.

The trial court erroneously found that Inquiry Concerning a Judge, 265 Ga. 326 (1995), mandates the sole and exclusive use of a mandamus nisi. In Inquiry Concerning a Judge, a magistrate judge issued orders that "directed the sheriff and his deputies to perform the very duties the law imposes." Id. at 328. This Court held these orders to be mandamus-like, and the power to issue mandamus is reserved for superior court judges only. See id. at 329.

> Although these orders appear to be in the nature of mandamus, a magistrate court does not have the power to issue writs of mandamus . . . nor was the required *notice* given or *hearing* held, O.C.G.A. § 9-6-27. [Judge] O'Neal would have certainly been authorized to file a petition for mandamus in the superior court, but she was not authorized to issue an order requiring the performance of an official duty.

Id. (emphasis added).

Placed into its proper context, Inquiry Concerning a Judge recognized the fundamental principle that *notice* and *hearing* are required before compelling the performance of an official duty – not a mandamus nisi. Since only notice and hearing are the stated requirements, Inquiry Concerning a Judge is reconcilable with Chapel Hill. *Notice* and *hearing* may be made either by petition/mandamus nisi pursuant to OCGA § 9-6-27 under Inquiry Concerning a Judge or by complaint/summons pursuant to the Civil Practice Act under Chapel Hill. Under either procedure, the right of *notice* and the opportunity to be *heard* is effectuated.

Therefore, the trial court ERRED by failing to consider the availability of ordinary process under the Civil Practice Act for mandamus actions. Had the trial court considered Chapel Hill in its Order, it would have recognized that the Civil Practice Act "plainly permits ordinary process to be used in mandamus cases." Chapel Hill, 232 Ga. at 240. Furthermore, the trial court would have reconciled both cases and concluded that under either procedure, the right of *notice* and the opportunity to be *heard* has been effectuated.

II. THE TRIAL COURT ERRED BY FAILING TO ANALYZE CORRECTLY THE VALIDITY AND APPLICABILITY OF THE *SHADIX* HOLDINGS TO THE INSTANT CASE.

When a statute is amended by the legislature, courts in Georgia must determine whether cases interpreting the prior law are still valid and applicable. To accomplish this, courts must apply proper statutory construction methods. The cardinal rule which guides statutory construction is to ascertain legislative intent and purpose in enacting law, and then give it that construction which will effectuate legislative intent and purpose. Hollowell v. Jove, 247 Ga. 678 (1981). "In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." OGCA § 1-3-1(a) (2002). In the instant case, the trial court failed to ascertain legislative intent behind two Bills that affected the law of the SPLOST of the instant case: House Bill 1704 (hereinafter, "HB 1704") enacted in 1994, and House Bill 15 (hereinafter, "HB 15") enacted in 1997.

The Order makes a thinly-veiled attempt at discussing legislative intent while cloaking HB 1704 and HB 15 from the analysis. Instead of discussing HB 1704 and HB 15, the trial

court stepped back into time and relied on Jackson v. Shadix, 272 Ga. 631 (2000) and Shadix v. Carroll County, 274 Ga. 560 (2001), cases that involved a SPLOST passed in 1993. See Shadix v. Carroll County, 239 Ga. App. 191-92 (1999). In fact, the trial court treated the Shadix cases as "dispositive" and conclusory. (R.412-413). The trial court seemingly gained a false sense of legislative intent and improperly determined that the General Assembly permitted the collections in the first place. (R. 413). Without a mere whiff of HB 1704 and HB 15, however, the trial court has committed an egregious error in statutory construction and analysis by focusing solely on outdated case law that was no longer germane.

A. The Law Of The SPLOST Prior To 1994.

The legislature amended SPLOST statutes in 1994 by enacting HB 1704. See 1994 Ga. Laws 1668-73.[3] Prior to 1994, OCGA §§ 48-8-111(a)(2) and -111(a)(3) read, in part, as follows:

> (a)(2) The maximum period of time, to be stated in calendar years or calendar quarters and not to exceed:
>
> > (A) Five years if the proceeds of the tax are to be used in whole for purposes *other than road, street, and bridge purposes for which the tax may be imposed;*
> >
> > *(B) Four years if the proceeds of the tax are to be used in whole for road, street, and bridge purposes for which the tax may be imposed; or*

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[3] A copy of HB 1704 is included in the Record at R.36-38.

> *(C) Four years for road, street, and bridge purposes and five years for purposes other than road, street, and bridge purposes if the proceeds of the tax are to be used in part for road, street, and bridge purposes and in part for purposes other than road, street, and bridge purposes for which the tax may be imposed;*
>
> [(a)](3) The maximum cost of the project or projects which will be funded from the proceeds of the tax, which maximum cost shall also be the maximum amount of net proceeds to be raised by the tax, except that if the tax is to be imposed in whole or in part for road, street, and bridge purposes the maximum cost and maximum proceeds to be raised shall be omitted[.]

GA. CODE ANN. § 48-8-111 (*1993*) (emphasis added).

Prior to 1994, OCGA §§ 48-8-121(g) read, in part, as follows:

> (g) If the county receives from the tax net proceeds *other than from a tax imposed in whole or in part for road, street, and bridge purposes* in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax or in excess of the actual cost of such project or projects, then such excess proceeds shall be subject to and applied as provided in this subsection. . . . Excess proceeds subject to this subsection shall be used solely for the purpose of reducing any indebtedness of the county other than indebtedness incurred pursuant to this article. If there is no such other indebtedness or, if the excess proceeds exceed the amount of any such other indebtedness, then the

> excess proceeds shall next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes.

GA. CODE ANN. § 48-8-121 (*1993*) (emphasis added).

The legislature's historical treatment of proceeds used for roads, streets, and bridge purposes (hereinafter, "roads purposes") is readily seen. Prior to 1994, the legislature made exceptions for proceeds used for "roads purposes." While the maximum period of time for collections was only four years, there was no set maximum amount of net proceeds to be collected, and there was only one condition in which "excess proceeds" existed. For proceeds used for "roads purposes," "excess proceeds" existed only when the county received net proceeds in excess of the actual cost of projects stated in the resolution.

B. The Law Of The SPLOST After 1994.

Sections 2, 3, and 6 of HB 1704 amended OCGA §§ 48-8-111(a)(2), -111(a)(3), and -121(g), respectively. See 1994 Ga. Laws 1670-72. After 1994, OCGA §§ 48-8-111(a)(2) and -111(a)(3) read, in part, as follows:

> (a)(2) The maximum period of time, to be stated in calendar years or calendar quarters and not to exceed five years;
>
> [(a)](3) The maximum cost of the project or projects which will be funded from the proceeds of the tax, which maximum cost shall also be the maximum amount of net proceeds to be raised by the tax[.]

GA. CODE ANN. § 48-8-111 (1996) (emphasis added).

After 1994, OCGA §§ 48-8-121(g) read, in part, as follows:

> (g)(1)(B) If the county receives from the tax net proceeds in excess of the maximum cost of the project or projects stated in the resolution or ordinance calling for the imposition of the tax or in excess of the actual cost of such project or projects, then such excess proceeds shall be subject to and applied as provided in paragraph (2) of this subsection.
>
> [(g)](2) Excess proceeds subject to this subsection shall be used solely for the purpose of reducing any indebtedness of the county other than indebtedness incurred pursuant to this article. If there is no such other indebtedness or, if the excess proceeds exceed the amount of any such other indebtedness, then the excess proceeds shall next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes.

GA. CODE ANN. § 48-8-121 (1996).

The Preamble to HB 1704 provides a number of reasons for the amendments, including "to change the maximum period of time for which such tax may be imposed for certain purposes[.]" 1994 Ga. Laws 1669. The legislature removed the historical treatment of proceeds under the "roads purposes" exception. Thereafter, all proceeds – including those collected for "roads purposes" – have a defined maximum amount and a maximum collection time of five years.

The Preamble to HB 1704 provides another reason for the legislature's action: "to change certain provisions regarding

the *expenditure of excess proceeds*[.]" Id. (emphasis added). The legislature removed the "roads purposes" exception applied to "excess proceeds." Where there had been only one condition of "excess proceeds" for "roads purposes," the deletion of the "roads purposes" exception expanded the conditions in which "excess proceeds" exist. After 1994, "excess proceeds" exist *where the county receives net proceeds in excess of the maximum cost of the projects stated in the resolution* – regardless of the use. This condition presently exists in the instant case and is one of the main issues. See infra Enumeration III at 16-19.

C. A Technical Oversight Created A Conflict In SPLOST Statutes.

The legislature failed to include OCGA § 48-8-112(b)(3) in HB 1704. This created a conflict, for the "roads purposes" exception was not wholly eliminated as intended by the legislature. Prior to 1997, OCGA § 48-8-112(b) read, in part, as follows:

> (b) The tax shall cease to be imposed on the earliest of the following dates:
>
> . . . .
>
> (3) *If the tax was imposed solely for purposes other than road, street, and bridge purposes*, as of the end of the calendar quarter during which the commissioner determines that the tax will have raised revenues sufficient to provide to the county net proceeds equal to or greater than the amount specified as the maximum amount of net proceeds to be raised by the tax.

GA. CODE ANN. § 48-8-112 (*1993*) (emphasis added).

The legislature amended OCGA § 48-8-112(b) in 1997 by enacting HB 15. After 1997, OCGA § 48-8-112(b) read, in part, as follows:

> (b) The tax shall cease to be imposed on the earliest of the following dates:
>
> . . . .
>
> (3) As of the end of the calendar quarter during which the commissioner determines that the tax will have raised revenues sufficient to provide to the county net proceeds equal to or greater than the amount specified as the maximum amount of net proceeds to be raised by the tax.

GA. CODE ANN. § 48-8-112 (1997).

Inadvertently, the legislature made a technical oversight by omitting from HB 1704 the changes to OCGA § 48-8-112(b). A conflict resulted between 1994 to 1997, affecting the 1996 SPLOST of the instant case. Therefore, conflict-resolving principles must be applied by this Court to determine the law, something that the trial court failed to do. When properly applied, it will become evident that the holdings of the Shadix cases are not germane, and that the trial court's finding is clearly erroneous.

D. Conflicting Laws Are Repealed.

The Bill that created the conflict provides the necessary guidance for resolution. Section 9 of HB 1704 states that "[a]ll laws and parts of laws in conflict with this Act are repealed." 1994 Ga. Laws 1673. Application of this rule means that the "roads purposes" exception language of OCGA § 48-8-112(b) between 1994 and 1997 was effectively

repealed or "blue-penciled" during this time.[4] Because the extent of HB 15 was the removal the "roads purposes" exception only, the post-1997 version of OCGA § 48-8-112(b) was effectively the law of the SPLOST upon enactment of HB 1704 in 1994. Accordingly, it was the law of the SPLOST in the instant case. Therefore, pursuant to Section 9 of HB 1704, it was unlawful for the Department of Revenue to collect SPLOST revenue for the entire five years because the "roads purposes" exception of OCGA § 48-8-112(b) was repealed in 1994. The Department should have ceased collections at the end of the calendar quarter when the net proceeds exceeded the maximum amount of $60 million.

E. Ambiguous Tax Laws Favor The Taxpayer And Are Construed Most Strongly Against The Government.

The law does not tolerate ambiguities or conflicts in taxation provisions:

> As made clear by precedent, we are bound to construe all ambiguities concerning the power to tax in favor of the taxpayers and against the taxing entity. Whenever the terms under which a tax is levied are not clear and positive or are open to various interpretations through indefiniteness of provisions, it is to be construed most strongly against the government and in favor of the citizen. Furthermore, this Court construes all doubtful cases against the power to tax and in favor of the taxpayer. If there is

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[4] The "blue-penciled test" is a judicial standard of which "only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words." BLACK'S LAW DICTIONARY 166 (7th ed. 1999).

> any doubt as to the power of the county to tax in a particular instance, it must be resolved in the negative.

Jackson v. Shadix, 272 Ga. at 637 (Sears, J., dissenting) (the majority holding that there was no ambiguity) (internal quotations and citations omitted).

Because the conflict created an ambiguity, this Court must resolve it against the Board. This may be accomplished by using the same method as discussed in the previous section, i.e., removing the ambiguity by blue-penciling the "roads purposes" exception of pre-1997 OCGA § 48-8-112(b). Again, the post-1997 version of OCGA § 48-8-112(b) was effectively the law of the SPLOST upon enactment of HB 1704 in 1994, i.e., the law of the instant case. Accordingly, pursuant to relevant case law, the ambiguities worked against the Board and Department of Revenue to collect SPLOST revenue for the entire five years, for collections should have ceased when the net proceeds exceeded the maximum amount of $60 million.

F. Even The Appellees Resolved the Conflict Correctly As The Resolution Indicates.

The method with which the Resolution was crafted indicates clearly that the Board knew of the conflict and resolved it correctly. The Board crafted much of the Resolution by paralleling actual statutory language. Paragraph 5 parallels the language of OCGA § 48-8-111(a)(3), Paragraph 7 parallels the language of OCGA § 48-8-121(a)(1), and Paragraph 8 parallels the language of OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2). Compare R.80-82, ¶¶ 5, 7, & 8 with GA. CODE ANN. §§ 48-8-111(a)(3), -121(a)(1), & -121(g)(1)(B) and -121(g)(2) (1996), respectively. Even the latter two sentences of Paragraph 2

parallel the language of OCGA § 48-8-112(a). Compare R.78-79, ¶ 2 with GA. CODE ANN. §§ 48-8-112(a).

However, the Board did not parallel the language of OCGA §§ 48-8-112(b) in the first two sentences of Paragraph 2. Id. The Board digressed and intentionally omitted the statutory language containing the "roads purposes" exception. This provides clear indication that the Board was fully aware of the conflicting statutes. The Board not only knew of the conflict but also resolved it correctly by repealing or blue-penciling the "roads purposes" exception of OCGA § 48-8-112(b) from Paragraph 2.

Accordingly, pursuant to the Board-crafted language of the Resolution, the Board should have taken action to prevent the Department of Revenue from collecting SPLOST revenue for the entire five years, for it was aware of the conflict and knew that tax collection should have ceased when the net proceeds exceeded the maximum amount of $60 million. Instead, using the Shadix cases as justification, the Board seized the moment and acquiesced to having "excess proceeds" collected, hoping or believing that collection per se came with an invisible power to spend. What the Board has failed to realize, however, is the power to spend flows from the legislature – not from the Department of Revenue or the mere act of an unlawful collection.

G. Statutory Analysis Has Rendered The *Shadix* Cases As Irrelevant.

It is evident from the preceding statutory analysis that collections should have ceased at the end of the calendar quarter when the net proceeds exceeded the maximum amount of $60 million under the post-1994 SPLOST statutory scheme. This is contrary to the holding of Jackson v Shadix where

collections were permitted beyond the maximum amount stated in the referendum under the pre-1994 scheme. See Jackson v. Shadix, 272 Ga. at 634. Thus, Jackson v. Shadix is not relevant or germane to the instant case. Neither is Shadix v. Carroll County, a case in which the parties made concessions with respect to "excess proceeds" based on this Court's earlier holding in Jackson v. Shadix. See Shadix v. Carroll County, 274 Ga. at 564.

Therefore, the trial court ERRED by failing to analyze correctly the validity and applicability of the Shadix cases. The trial court improperly treated the Shadix cases as "dispositive" and conclusory without proper statutory analysis. (R.412-413). Contrary to the trial court's finding, the General Assembly did not "permit the County to collect SPLOST proceeds" in excess of the maximum amount of $60 million. (R.412-413). Had the trial court conducted a proper analysis of the changes made to the SPLOST statutes in 1994, it would have concluded that the holdings of the Shadix cases were not germane to the instant case. Because the Shadix cases are not applicable to the instant case, a thorough analysis of OCGA §§ 48-8-121(g)(1)(B), -121(g)(2), and -121(a)(1) is required.

III. THE TRIAL COURT ERRED BY FAILING TO CONSTRUE CORRECTLY OCGA §§ 48-8-121(g)(1)(B) AND -121(g)(2).

Georgia courts must not construe a statute in a manner that renders statutory language as meaningless and mere surplusage. "A construction of a statute by the court shall not render the statutory language meaningless or mere surplusage." Cobb County Board of Tax Assessors v. Morrison, 249 Ga. App. 691, 693 (2001) (citing State v. C.S.B., 250 Ga. 261, 263 (1982)). Courts in Georgia "must

seek to give meaning to each part of the statute and to avoid constructions which render a portion of the statute mere surplusage." City of Buchanan v. Pope, 222 Ga. App. 716, 717 (1996) (internal citations and quotations omitted).

In the instant case, the trial court failed to apply proper statutory construction analysis. Not only did the Order fail to determine legislative intent of HB 1704, it failed to give meaning to specific statutory language, rendering it meaningless and treating it as mere surplusage.

A. The Legislature Intended A Full Second Definition Of "Excess Proceeds" By Removing The "Roads Purposes" Exception.

The legislature intended "to change certain provisions regarding the *expenditure of excess proceeds*[.]" 1994 Ga. Laws 1669 (emphasis added). The legislature removed the "roads purposes" exception that applied to "excess proceeds" thereby enabling a second condition which existed latently for "non-roads purposes" only. Clearly, the legislature in 1994 intended to expand the definition of "excess proceeds" to include those conditions *where the county receives net proceeds in excess of the maximum costs of the projects stated in the resolution* – regardless of the use.

It is self-evident that "excess proceeds" exist under post-1994 OCGA § 48-8-121(g)(1)(B). The Board declared the maximum costs of the projects to be $60,000,000, and an amount of $71,877,176 was collected. (R.62-63, ¶ 12). This meets the definition of "excess proceeds" because "the county receive[d] from the tax net proceeds in excess of the maximum cost of the . . . projects stated in the [R]esolution. . . ." GA. CODE ANN. § 48-8-121(g)(1)(B) (1996).

The trial court opted to disregard this definition of "excess proceeds" in favor of the other, where net proceeds received exceed "the actual costs of such . . . projects." Id.; (R.412). In its Order, the trial court found "that there can be no 'excess proceeds'" and rejected Haugen's argument. (R.412). However, the trial court failed to determine the legislature's intent behind HB 1704 which changed "certain provisions regarding the *expenditure of excess proceeds*[.]" 1994 Ga. Laws 1669 (emphasis added). The Order fails to "look diligently into the intention of the General Assembly" behind HB 1704. OCGA § 1-3-1(a) (2002). Had the trial court correctly construed the intent of the legislature, it would have found that "excess proceeds" exist in the amount of $11,877,176.

B. The Language of The Statute Has Meaning And Is Not Surplusage.

It is clear from the preceding section that the phrase "[i]f the county receives from the tax net proceeds in excess of the maximum cost of the project . . . stated in the resolution" has meaning in the instant case. GA. CODE ANN. § 48-8-121(g)(1)(B) (1996). Under this phrase, "excess proceeds" exist. Accordingly, any construction rendering this phrase as meaningless or mere surplusage would be improper statutory construction under Morrison and Pope.

The trial court failed to follow this statutory construction principle. By finding "that there can be no 'excess proceeds'" in its Order, the trial court has acted contrary to Morrison and Pope. (R.412). The Order fails to give meaning to the phrase defining "excess proceeds" and renders it as mere surplusage. Moreover, the Order essentially permits the Board the ability to choose for itself when "excess proceeds" exist. This position, however, is untenable because

the language of the statute does not indicate a choice but rather two distinct points in time when "excess proceeds" can have meaning.

Therefore, the trial court has improperly construed the statute by treating one definition of "excess proceeds" as meaningless and as mere surplusage. Had the trial court correctly applied the statutory construction principles of Morrison and Pope, it would have found that "excess proceeds" exist in the amount of $11,877,176.

C. The Board Has The Duty To Transfer "Excess Proceeds" To The General Fund.

The legislature has mandated the use of "excess proceeds" under OCGA § 48-8-121(g)(2). With no indebtedness to which "excess proceeds" can be applied, the "excess proceeds *shall next be paid into the general fund of the county*, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes."[5] GA. CODE ANN. § 48-8-121(g)(2) (1996) (emphasis added).

The language of OCGA § 48-8-121(g)(2) is plain and unambiguous, and not subject to construction. "A plain and unambiguous statute cannot be construed by the courts." Morrison, 249 Ga. App. at 693 (2001) (citing Frazier v. Southern R. Co., 200 Ga. 590 (1946)); see Jennings v. McIntosh County Board of Commissioners, No. S03A0135, 2003 WL 21486979, at *3 (Ga. June 30, 2003), and Six Flags Over Georgia v. Kull, 276 Ga. 210, 211 (2003). Thus, the

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[5] The Board has conceded that there is no indebtedness of Henry County with which "excess proceeds" can be applied pursuant to OCGA § 48-8-121(g)(2). (R.139-140, n.2).

meaning of OCGA § 48-8-121(g)(2) clearly states that the Board has the duty pay the "excess proceeds" in the amount of $11,877,176 into the general fund of the county.

Therefore, the trial court ERRED by failing to construe correctly OCGA §§ 48-8-121(g)(1)(B) and -121(g)(2). The trial court failed to determine the legislative intent behind HB 1704, and it impermissibly rendered statutory language as meaningless and mere surplusage. Contrary to the trial court finding, "excess proceeds" exist under OCGA § 48-8-121(g)(1)(B), and the Board has the duty to pay the "excess proceeds" in the amount of $11,877,176 into the general fund of the county pursuant to OCGA § 48-8-121(g)(2).

IV. THE TRIAL COURT ERRED BY INCORRECTLY CONSTRUING OCGA § 48-8-121(a)(1).

Courts in Georgia must be careful not to confuse the language of statutes with the language of this Court's opinion interpreting the same statutes. When the facts of a case line up with the plain and unambiguous language of the statute, then this Court's opinion – tailoring a construction of the statute based upon a wholly different issue and fact pattern – is unnecessary. Georgia courts risk obfuscating the plain and unambiguous language of the statute.

In the instant case, the Order has avoided language of the statute and obfuscated it with the language of Dickey v. Storey, 262 Ga. 452 (1992). By relying on the holding of Dickey, the trial court has incorrectly construed the statute because a "plain and unambiguous statute cannot be construed by the courts." Morrison, 249 Ga. App. at 693; see Jennings, 2003 WL 21486979, at *3, and Six Flags, 276 Ga. at 211. Moreover, by incorrectly construing the statute, the trial court has effectively found the following: the Board does

not have the lawful duty to comply with the terms and conditions of the Resolution.

A. The Language of The Statute Is Plain And Unambiguous.

"The proceeds received from the tax authorized by this article *shall be used by the county exclusively for the purpose or purposes specified in the resolution*. . . ." GA. CODE ANN. § 48-8-121(a)(1) (1996) (emphasis added). Code Section 48-8-121(a)(1) plainly and unambiguously states that the Board shall use proceeds exclusively for the *purposes* stated in the *Resolution* – not for the *projects* stated in *reports*.

The Resolution identifies the exclusive purpose for those proceeds received in excess of the maximum costs of projects of $60,000,000. Paragraph 8 of the Resolution states that "the excess proceeds shall . . . be paid into the general funds of the county and shall be used for the purpose of reducing ad valorem taxes." (R.82, ¶ 8) (emphasis **not** added). The Resolution clearly, conspicuously, and imperatively states that "excess proceeds" shall be applied towards ad valorem tax reduction. Accordingly, as applied to the facts of the instant case, the plain and unambiguous language of the statute means that "[excess] proceeds . . . shall be used by the county exclusively for the purpose [of ad valorem tax reduction as] specified in the [R]esolution. . . ." GA. CODE ANN. § 48-8-121(a)(1) (1996). Therefore, it is the statutory duty of the Board to use "excess proceeds" exclusively for purpose of ad valorem tax reduction as specified in the Resolution.[6]

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[6] An illustration of a method in which the Board may apply the "excess proceeds" towards an ad valorem tax reduction is part of the Record. (R.401). Resolution 02-41 levied and assessed ad valorem taxes for the year 2002. Paragraph VI of Resolution 02-41 illustrates how the collection of Local Option Sales Tax proceeds

B. The Trial Court Avoided The Language Of The Statute And Obfuscated It With *Dickey v. Storey*.

In the instant case, the language of OCGA § 48-8-121(a)(1) is conspicuously absent from the Order. (R.407-414). The trial court made no determination whether the statutory language was plain and unambiguous. Instead, the trial court bypassed this step and proceeded directly to this Court's holding in Dickey. By relying solely on Dickey, the trial court found that Haugen's position is "undermined" and that a writ of mandamus requested by him would "directly conflict with the express holding of *Dickey*." (R.413). The Order states that the Board "'is bound . . . to complete all *projects* listed in' the SPLOST budget and account *reports* and that the board 'may not abandon the *projects* altogether.'" (R.413) (quoting Dickey, 262 Ga. at 456) (emphasis added).

In its haste, the trial court has obfuscated the statutory language with the language of Dickey. Instead of first determining whether the "excess proceeds" are being used "exclusively for the *purpose* or *purposes* specified in the *resolution*[,]" the trial court has shifted its focus to *projects* listed in *reports*. Cf. GA. CODE ANN. § 48-8-121(a)(1) (1996) with R.413. Clearly, obfuscating the statutory language with the language of Dickey bolsters the Board's position. Moreover, it is painfully obvious that the Board has flooded the Record with *reports* of *projects*, likely distracting the trial court's attention and causing it to shift its focus from the language of the statute to the language of Dickey. (R.188-291).

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in the amount of $11,528,380 lowers the millage rate by 3.01 mills. The "excess proceeds" of the instant case may be applied in a similar fashion to achieve ad valorem tax reduction by lowering the millage rate.

C. The Term "Resolution" Is Significant.

The resolution plays an integral part of the SPLOST program. The resolution provides the means with which the legislature empowers the governing officials of the county to define the parameters of the SPLOST, providing these officials with the ability to meet specific needs of their county by tailoring the language in the resolution. For all intents and purposes, officials define the "metes and bounds" of the SPLOST through the use of the resolution.

The legislature requires the resolution to be specific. First, the *resolution shall specify* the "purpose or purposes for which the proceeds of the tax are to be used. . . ." OCGA § 48-8-111(a)(1) (emphasis added). Second, the *resolution shall specify* the "maximum period of time . . . [which is] not to exceed five years[.]" OCGA § 48-8-111(a)(2) (emphasis added). Third, the *resolution shall specify* the "maximum cost of the project or projects which will be funded from the proceeds of the tax, which maximum cost shall also be the maximum amount of the net proceeds to be raised by the tax[.]" OCGA § 48-8-111(a)(3) (emphasis added).

The Board in the instant case defined the parameters of the Henry County SPLOST with the Resolution. The *purpose or purposes for the proceeds of the tax*, the *maximum time period*, and the *maximum costs* were expressed in the Resolution and are found in Paragraphs 3, 2, and 5, respectively. (R.78-80, ¶¶ 3, 2, & 5).

Another parameter defined by the Board was the waiving of any discretionary authority over the "excess proceeds." (R.82, ¶ 8). The language of Paragraph 8 of the Resolution was intentionally made more narrow than the statute governing the "use of excess proceeds." (R.82, ¶ 8). The

applicable statute states that excess proceeds shall be "paid into the general fund of the county, *it being the intent* that any funds so paid into the general fund of the county be used *for the purpose of reducing ad valorem taxes*." OCGA § 48-8-121(g)(2) (emphasis added). The Resolution states that excess proceeds shall be "paid into the general fund of the county and *shall be used* for the [exclusive] purpose of reducing ad valorem taxes." (R.82, ¶ 8) (only italics emphasis added). The Board's adoption of the imperative phrase "shall be used" indicates the Board's clear intent to waive any discretionary authority and make the matter of the use of "excess proceeds" purely ministerial.

Once the resolution is defined, voter approval is required. In order to present the SPLOST to the voters, the governing authority forwards a copy of the resolution to the county's election superintendent calling for SPLOST imposition. OCGA § 48-8-111(a). The election superintendent calls for an election. OCGA § 48-8-111(b). If more than one-half of the voters favor the imposition of the SPLOST, the tax shall be imposed. OCGA § 48-8-111(e).

Clearly, the Board in the instant case could not have enabled the SPLOST by merely approving the Resolution. Voter approval was needed. Voters of Henry County were presented with the referendum to impose the SPLOST, and the voters approved its imposition. (R.61, ¶ 7). Underlying the language of the referendum was the Resolution that provided the terms and conditions of the Henry County SPLOST. Therefore, the voters agreed to be taxed under the terms and conditions of the Resolution in which the Board waived its discretionary authority over the "excess proceeds."

The Board now seeks to abandon the terms and conditions of the Resolution, and exercise discretionary authority over

"excess proceeds." If the Board had initially reserved discretionary authority with broad crafting techniques in the Resolution, then voters would have accepted the Board's use of discretionary authority including the subsequent management of the SPLOST. On the other hand, if the Board had waived discretionary authority as it clearly did in the instant case, the Board cannot later assert discretionary authority after the presentment to the voters. Clearly, when the ultimate approval to authorize the SPLOST rests with the voters and not with the Board, the Board has the lawful duty to comply with the terms and conditions of the Resolution. Even if a statutory duty did not exist for the Board to comply with the terms and conditions of the Resolution, a legal duty would.

Therefore, the trial court ERRED by incorrectly construing OCGA §§ 48-8-121(a)(1). In its Order, the trial court failed to determine whether the language of the statute is plain and unambiguous with the facts of the instant case, and it impermissibly obfuscated the statutory language with the language of Dickey. The Board has the lawful duty to comply with the terms and conditions of the Resolution. Contrary to the trial court's finding, public officials have the statutory duty to use proceeds exclusively for the purposes specified in the resolution. Specific to the facts of the instant case, the Board has the statutory duty to use "excess proceeds" in the amount of $11,877,176 exclusively for purpose of ad valorem tax reduction pursuant to Paragraph 8 of the Resolution.

V. THE TRIAL COURT ERRED BY FAILING TO DETERMINE THE APPLICABILITY OR RELEVANCY OF *DICKEY V. STOREY.*

The holding in Dickey v. Story, 262 Ga. 452 (1992), is neither applicable nor relevant to the instant case. The issues are entirely different. Dickey involved *waste* of SPLOST funds, and the holding focused on the discretionary authority of the Floyd County Board of Commissioners (hereinafter, "Floyd BOC") to *change site locations* of projects *after funds had been expended* on original project sites. Dickey did not involve the net proceeds received in excess of the maximum costs of projects stated in a resolution – the sole issue of the instant case. This Court in Dickey did not factor OCGA §§ 48-8-121(g)(1)(B) and -111(a)(3) into its holding. Therefore, the Board's notion that Dickey legally obligates a county "to expend SPLOST funds on SPLOST projects until the projects are completed in their entirety or until the SPLOST funds are exhausted in their entirety" is legally flawed. (R.183).

A. The Facts And Procedural Actions of *Dickey v. Storey.*

Dickey involved two projects – a governmental complex called "the Forum" and a softball complex. Dickey, 262 Ga. at 452. These projects and their respective locations were specifically identified prior to SPLOST enactment and were subsequently adopted in budget and account reports. See id. at 452-53. The Forum was to be located "on the banks of the Oostanaula River in downtown Rome." Id. at 453. The softball complex was slated for the West Rome area to replace existing fields. Id. at 452. After the SPLOST was enacted, the Floyd BOC expended approximately $2.5 million, or 19% of the total Forum budget, in acquiring site property and developing the Forum. See id. at 453-54. The Floyd BOC also "purchased property for a softball complex adjacent to existing ball fields." Id. at 455. After two new commissioners were elected, the Floyd BOC voted "to bisect the Forum and move a portion of it to an undetermined area" and to

downgrade its size. Id. at 455; see id. at 453. The Floyd BOC also "purchased property in another area of the county for a softball complex, and raised the issue of whether it would abandon the original softball complex site purchased with SPLOST funds." Id. at 453.

In an action for mandamus and injunctive relief, the trial court found that the Floyd BOC abused its discretion. Id. at 454-55. "The trial court found that the Board's attempts to abandon the SPLOST projects at issue constituted waste, and breached the Board's fiduciary duty to the public." Id. This Court affirmed the trial court's finding that the Floyd BOC abused its discretion to bisect the Forum and move a portion of it to an undetermined area, but this Court reversed the trial court's finding with regards to the softball complex. Id. at 455.

B. The Issue In *Dickey* Was "Waste" – Not "Excess Proceeds."

Clearly, the sole issue in Dickey was *waste* of SPLOST funds. The holding focused on the discretionary authority of the Floyd BOC to *change site locations* of projects *after funds had been expended* on original project sites. There was no issue of "excess proceeds," nor were the statutory provisions OCGA §§ 48-8-121(g)(1)(B) and -111(a)(3) broached. The holding of Dickey was based only on the provisions of OCGA §§ 48-8-110, -121(a)(1), and –121(a)(2):

> The SPLOST Act, OCGA §§ 48-8-110 et seq., provides that the proceeds from the SPLOST tax "shall be used by the county *exclusively for the purpose or purposes specified in the resolution or ordinance calling for imposition of the tax." (Emphasis supplied.) OCGA § 48-8-121(a)(1). OCGA*

> *§ 48-8-121(a)(2) requires the county to maintain a financial record of each project for which the proceeds of the tax are used. This record will be subject to an annual audit under the provisions of this Code section.*
>
> . . . .
>
> Construing these Code sections, we hold that the Board is not authorized to use proceeds from the SPLOST tax for a purpose entirely different from that contained in the SPLOST budget and account reports. We further hold that the Board is bound by the SPLOST budget and account reports to complete all projects listed therein unless circumstances arise which dictate that projects which initially seemed feasible are no longer so. In this regard the governing authority has discretion to make adjustments in the plans for these projects, but may not abandon the projects altogether.

Dickey, 262 Ga. at 455-56.

This Court did not address the language of OCGA § 48-8-121(a)(1) in view of the legislature's intent to limit the Board's power to spend as stated in OCGA § 48-8-121(g)(1)(B) or its expressed intent to apply "excess proceeds" towards ad valorem tax reduction.

C. Applying Statutes In Pari Materia.[7]

"A statute must be construed in relation to other statutes of which it is a part, and all statues relating to the same subject-matter, briefly called statutes "in pari materia," are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto." Pope, 222 Ga. App. at 717 (internal citations and quotations omitted).

The legislature has mandated that the Board use SPLOST proceeds *exclusively for the purposes specified in the resolution*. OCGA § 48-8-121(a)(1). The exclusive purpose specified in the Resolution for those proceeds received in excess of the maximum cost of $60,000,000 is ad valorem tax reduction. (R.82, ¶ 8). The legislature has also mandated that "[e]xcess proceeds subject to this subsection shall be used solely for the purpose of reducing any indebtedness of the county. . . ." OCGA § 48-8-121(g)(2). Where there is no indebtedness of the county in which to apply the "excess proceeds" as in the instant case, the legislature has mandated that "the excess proceeds shall next be paid into the general fund of the county, it being the intent that any funds so paid into the general fund of the county be used for the purpose of reducing ad valorem taxes." Id.

It is not possible to reconcile the "use of excess proceeds" provisions of OCGA § 48-8-121(g)(2) with the Board's position adopted by the trial court. The legislature has

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[7] OCGA 48-8-121(a)(1) is plain and unambiguous of its face with the facts of the instant case. The argument herein for the application of statutes in pari materia assumes, arguendo, that it is not. "[S]tatutes in pari materia could not be looked to where the language of the statute under consideration was clear and unambiguous." Oxford v. Carter, 216 Ga. 821, 823 (1961).

specifically mandated that "excess proceeds" be used in reducing the indebtedness of the county and in making payment into the general fund of the county. Id. Moreover, the legislature specifically expressed its intent that "excess proceeds" be applied towards ad valorem tax reduction – not the encumbrance of more SPLOST projects. Id. It is inconceivable that, when construed statutes in pari materia, "Henry County is legally obligated to expend SPLOST funds on SPLOST projects until the projects are completed in their entirety of the SPLOST funds are exhausted in their entirety." (R.183).

Therefore, the trial court ERRED by failing to determine the applicability or relevancy of Dickey. The issue of Dickey was waste – not "excess proceeds" – and the holding focused on the discretionary authority of the Floyd BOC to *change site locations* of projects *after funds had been expended* on original project sites. While Dickey is certainly valid for issues involving proceeds received up through the stated maximum amount, it is not valid for issues involving "excess proceeds." Contrary to the trial court's finding, the Board is NOT legally obligated or "entitled to expend for SPLOST purposes all of the SPLOST proceeds generated during the relevant five year period, even if those proceeds exceed the amount identified in the Resolution." (R.413).

VI. THE TRIAL COURT ERRED BY DENYING INJUNCTIVE RELIEF.

A taxpayer may sue to enjoin county officials from doing unlawful, unauthorized, or illegal acts. Ferguson v. Randolph County, 211 Ga. 103, 109 (1954). Also, "equity will exercise jurisdiction to restrain acts or threatened acts of public officers which are ultra vires and beyond the scope of their authority, outside their jurisdiction, unlawful or without

authority." Head v. Browing, 215 Ga. 263, 267 (1959) (internal citations omitted).

As the foregoing discussion has established, "excess proceeds" exist in the amount of $11,877,174 under OCGA § 48-8-121(g)(1)(B); the Board has the duty pay the "excess proceeds" into the general fund of the county pursuant to OCGA § 48-8-121(g)(2); and the Board has the duty to use "excess proceeds" exclusively for purpose of ad valorem tax reduction as specified in the Resolution pursuant to OCGA § 48-8-121(a)(1). However, the existence of Contingency Accounts in the Independent Accountant's Report indicates the Board's plan to spend "excess proceeds" in a manner contrary to the lawful duties of the foregoing discussion. Therefore, injunctive relief is proper under Ferguson and Head.

Furthermore, by denying injunctive relief, the trial court has acted antagonistic to the law and has failed to follow the law. "Equity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable. . . ." GA. CODE ANN. § 23-1-6 (2002).

Therefore, the trial court ERRED by denying injunctive relief. Injunctive relief is proper under Ferguson and Head, and equity has not followed the law.

CONCLUSION

Haugen has established that the following: "excess proceeds" in the amount of $11,877,174 exist under OCGA § 48-8-121(g)(1)(B); the Board has the duty pay the "excess proceeds" into the general fund of the county pursuant to OCGA § 48-8-121(g)(2); and the Board has the duty to use "excess proceeds" exclusively for purpose of ad valorem tax

reduction as specified in the Resolution pursuant to OCGA § 48-8-121(a)(1).

Based upon the foregoing discussion, James L. Haugen respectfully requests this Court to grant his appeal and to:

(a) REVERSE the trial court's denial of his request for mandamus relief,
(b) REVERSE the trial court's denial of his request for injunctive relief,
(c) REVERSE the trial court's grant of judgment in favor of the Board in its Order,
(d) REMAND this matter to the trial court and DIRECT the trial court to issue mandamus relief compelling the Board to perform its lawful duties in accordance with the foregoing discussion,
(e) REMAND this matter back to the trial court for further proceedings,
(f) GRANT recovery of all costs associated with the trial court,
(g) GRANT recovery of all costs associated with the instant appeal,
(h) GRANT recovery of all costs associated with the Emergency Motion To Stay, Haugen v. Henry County, S03M1039 (Ga. filed April 1, 2003), and/or
(i) GRANT any such other and further relief that may seem just and proper to this Court.

ϑϑϑ

This _____ day of July, 2003.

Respectfully Submitted,

_____

James L. Haugen
Pro Se

APPENDIX

VERIFICATION

Georgia, Henry County

In person before the undersigned officer authorized to administer oaths comes _____ who states on oath that he is the Appellant named in the foregoing "Brief of Appellant" and that the facts contained in said "Brief of Appellant" are true and correct.

_____
Appellant

Sworn to and subscribed before me
this _____ day of _____,
_____.

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing "Brief of Appellant" upon counsel of Appellees by depositing a copy of same in the United States mail, first class, with sufficient postage thereon to insure delivery addressed to the following:

Michael A. O'Quinn, Esq.
O'Quinn & Cronin
21 Sims Street
McDonough, GA 30253

This ____ day of July, 2003.

_____

James L. Haugen
Pro Se

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McDonough, Georgia 30253
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(w): (404) 880-7192
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APPENDIX G

IN THE SUPREME COURT
STATE OF GEORGIA

No. S03A1444

[Filed July 28, 2004]

JAMES L. HAUGEN, Plaintiff/Appellant,	)
v.	)
HENRY COUNTY, GEORGIA, a political subdivision; and LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS, and LEE HOLMAN, Individually and as members of the Board of Commissioners of Henry County, Georgia, Defendants/Appellees.	)

BRIEF OF APPELLEES HENRY COUNTY, GEORGIA, LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS AND LEE HOLMAN

BRIEF OF APPELLEES HENRY COUNTY, GEORGIA, LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS AND LEE HOLMAN

COME NOW HENRY COUNTY, GEORGIA, LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS and LEE HOLMAN, Appellees in this Appeal, and file this their Brief in this matter.

FACTUAL BACKGROUND

On August 5, 1996, Henry County, Georgia passed Resolution No. 96-14 (hereinafter the "Resolution"), pursuant to which the Board of Commissioners of Henry County proposed a Special Purpose Local Option Sales Tax (hereinafter "SPLOST") to be used and expended for: (1) "[r]oad, street, and bridge purposes;" and (2) "capital outlay projects for the use and benefits of the citizens of the entire county," including "library facilities, parks and recreational facilities; expansion and renovation of the Henry County courthouse, including a parking deck; senior citizens activities centers including administrative space; a center for the training of the developmentally disabled; an addition to the Henry County jail; fire stations, and a performing arts center." (R. 18 at ¶¶ 3(a), 3(b)).

The Resolution provided that the "duration of the sales and use tax imposed hereby shall be five calendar years" and that the "maximum cost of the projects which will be funded from the proceeds of the tax ... shall be sixty million dollars." (R. 17 at 2; R. 19 at ¶ 5).

In addition, the Resolution specifically provided:

> If the county receives from the tax net proceeds in excess of the maximum cost of the projects stated in this resolution or in excess of the actual cost of such projects, then such excess proceeds shall be used solely for the purpose of reducing any indebtedness of the county other than bonded indebtedness and, if there is no such other indebtedness, or if the excess proceeds exceed the amount of any such other indebtedness, than the excess proceeds shall next be paid into the general fund of the county and shall be used for the purpose of reducing *ad valorem* taxes.

(R. 21 at ¶ 8).

The Resolution was presented for approval to the county voters at an election on September 17, 1996. (R. 19 at ¶ 6). The referendum ballot provided:

> Shall a special 1 percent sales and use tax be imposed in Henry County for a period not to exceed five years and for the raising of not more than $60,000,000 for road, street, and bridge purposes and for the purposes of Capital outlay projects for the use and benefit of the citizens of the entire county consisting of library facilities; parks and recreational facilities; expansion and renovation of the Henry County courthouse, including a parking deck; senior citizens activities centers, including administrative space; a center for the training of the developmentally disabled; an addition to the Henry County jail; fire stations; and a performing arts center?

(R. 19 at ¶ 6). The referendum was held, and more than one-half of the votes cast favored imposing the SPLOST. (R. 11 at ¶ 6).

Prior to the Resolution, a study committee was formed to designate the projects to be included in the SPLOST referendum. (R. 190 at ¶ 3). The SPLOST referendum was prepared and formulated based on the designated projects. (R. 190 at ¶¶ 4, 5). Once prepared and formulated, the designated projects were disseminated to the voters for their review and inspection prior to the vote on the SPLOST referendum. (R. 190 at ¶ 6). Upon approval by the voters, the designated projects became the projects listed in the SPLOST budget and account reports. (R. 191 at ¶¶ 7-11; R. 265 at ¶¶ 5-7).

Between March 1997 and April 2002, the tax generated approximately $71,877,176 in net proceeds, approximately $11.8 million more than the amount specified in the Resolution. (R. 409). With accumulated interest, the total amount in the SPLOST account was approximately $76.4 million as of May 30, 2002. (R. 409). As of October 22, 2002, approximately $60 million of the funds generated through the SPLOST had been spent on the projects defined in the Resolution and, as of that same date, numerous projects remained uncompleted and/or are ongoing, including parks and recreational facilities, library facilities, road and street projects, and the expansion and renovation of the Henry County Courthouse. (R. 266 at ¶¶ 8, 9; R. 192 at ¶¶ 12,13). It is estimated that it will cost approximately $27.5 to $27.9 million to complete the road and street paving projects alone. (R. 266 at ¶ 10). Henry County intends to expend all of the remaining SPLOST funds on uncompleted or ongoing projects identified in the Resolution. (R. 410).

PROCEDURAL BACKGROUND

Appellant James L. Haugen filed this mandamus action against Appellees alleging that Henry County has refused or failed to perform ministerial duties with respect to the 1996 SPLOST proceeds. Appellant ultimately contends that Appellees are not permitted to spend the proceeds received above the $60 million articulated in the Resolution on the projects identified in the Resolution. It is Appellant's position that the $11.8 million in question must be spent on ad valorem tax reduction. A hearing in this matter was set for October 4, 2002. (R. 410). Prior to the hearing, Appellant added a claim for injunctive relief seeking to prevent Appellees from spending the $11.8 million at issue. (R. 410).

At the hearing, Appellees moved to dismiss. Appellees argued that Appellant's action was barred because a mandamus nisi had not been granted or served and the mandamus hearing had not occurred within the period specified in O.C.G.A. § 9-6-27(a). (R. 410). Appellees also argued that further expenditure of the SPLOST proceeds on the projects identified in the Resolution is permissible under O.C.G.A. 48-8-12 l(g)(1)(B) because the net proceeds of the tax is not "in excess of the actual cost of such project," which currently is ongoing. (R. 410). Appellees argued that, as a result, they are under no statutory or other duty to use any of the proceeds for ad valorem tax reduction. (R. 410).

By Order entered on March 31, 2003, the trial court ruled that Appellant's petition for mandamus was fatally defective as he failed to follow the procedure set forth in O.C.G.A. § 9-627(a). (R. 411). The trial court further held that Appellant's claims failed as a matter of law because the SPLOST properly terminated at the expiration of the five (5) year period identified in the Resolution and the SPLOST

funds generated after the $60 million identified in the Resolution had been collected were not "excess proceeds" within the meaning of O.C.G.A. § 48-8-121(g)(1)(B). (R. 411-14).

ARGUMENT AND CITATION OF AUTHORITIES

Because Appellant failed to observe the specific mandamus procedure set forth in O.C.G.A. § 9-6-27(a), the trial court properly dismissed his mandamus petition with prejudice.

The trial court correctly held that the expiration of the five (5) year period identified in the Resolution was the proper termination point for the SPLOST at issue in this matter. The fact that the SPLOST generated $60 million prior to that point is irrelevant. Moreover, the trial court correctly held that all of the SPLOST revenue generated during that five (5) year period can be expended on the SPLOST projects that remain uncompleted.

I. APPELLANT'S PETITION FOR MANDAMUS WAS PROPERLY DISMISSED WITH PREJUDICE AS HE FAILED TO FOLLOW THE PROCEDURES MANDATED BY STATUTORY LAW

As correctly held by the trial court, O.C.G.A. § 9-6-27 (1982) sets forth the practice and procedure governing mandamus actions. (R. 411). That holding is mandated by O.C.G.A. § 9-11-81 (1993), which reads as follows:

> This chapter shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by law; but, in any event, the

> provisions of this chapter governing the sufficiency of pleadings, defenses, amendments, counterclaims, cross-claims, third-party practice, joinder of parties and causes, making parties, discovery and depositions, interpleader, intervention, evidence, motions, summary judgment, relief from judgments, and the effect of judgments shall apply to all such proceedings.

It is clear that mandamus actions are "special statutory proceedings." Thompson v. Willson, 223 Ga. 370, 372 (1967); Farley v. State, 180 Ga. App. 694, 695-96 (1986) (citing Lang v. State, 168 Ga. App. 693(4)(1983)). Because service of process is not one of the areas exclusively governed by the Georgia Civil Practice Act pursuant to O.C.G.A. § 9-11-81, e.g., sufficiency of pleadings, defenses, etc., the question is whether O.C.G.A. § 9-6-27 expressly prescribes a practice and procedure that conflicts with the practice and procedure set forth in the Georgia Civil Practice Act. See Anderson v. Flake, 270 Ga. 141, 142 (1998) (holding that defendants in quo warranto actions must file responsive pleadings because the statutory framework governing that special statutory proceeding was silent with respect to responsive pleadings).

O.C.G.A. § 9-6-27 (a) reads as follows:

> Upon the presentation of an application for mandamus, if the mandamus nisi is granted the judge shall cause the same to be returned for trial not less than ten nor more than 30 days from such date. The defendant shall be served at least five days before the time fixed for the hearing.

This statute clearly prescribes "specific rules of practice and procedure" within the meaning of O.C.G.A. § 9-11-81 that are in "conflict" with the Georgia Civil Practice Act generally and O.C.G.A. § 9-11-4 (2002 Supp.) specifically. See Nodvin v. Georgia Power Co., 125 Ga. App. 821, 822-23 (1972) (holding that statute authorizing superior court to order all persons concerned to appear before special master, between 10 and 15 days from service, to make known matters material to their rights and authorizing court to order continuance for good cause set up "specific rules of practice and procedure" within meaning of O.C.G.A. § 9-11-81).

Appellant concedes that the process set forth under O.C.G.A. § 9-6-27 is in conflict with the process articulated in the Georgia Civil Practice Act. Appellant's Brief at page 6 (describing the procedure set forth in the Georgia Civil Practice Act as an "alternative procedure"). Such a concession is necessary because O.C.G.A. § 9-6-27 requires a superior court judge to issue a mandamus nisi before the suit can proceed and further requires the mandamus nisi to be served upon the defendants. Thompson, 223 Ga. at 371. However, the Georgia Civil Practice Act purports to allow a plaintiff to unilaterally circumvent the judicial gatekeeper provision of O.C.G.A. § 9-6-27 by merely filing a complaint and requesting the clerk's office to issue a summons. O.C.G.A. 9-11-4.

Appellant's reliance on DeKalb County v. Chapel Hill, Inc., 232 Ga. 238 (1974), is misguided as the holding in said case cannot be supported in light of O.C.G.A. § 9-11-81. Citing language in O.C.G.A. § 9-11-4, this Court in Chapel Hill held that "ordinary process" could be utilized in "mandamus cases." Id. at 240. However, this Court in Chapel Hill failed to perform the analysis mandated by O.C.G.A. § 9-11-81, i.e., it failed to analyze whether the

"specific rules of practice and procedure" governing mandamus actions "conflict" with the practice and procedure set forth in the Georgia Civil Practice Act. See id. at 240. Because even Appellant concedes the conflict, Chapel Hill's holding that O.C.G.A. § 9-6-27 can be bypassed at the whim of plaintiffs cannot withstand further scrutiny from this Court. Importantly, this Court has implicitly recognized that Chapel Hill is legally infirm. See Inquiry Concerning a Judge, 265 Ga. 326, 329 (1995).

To the extent that the General Assembly desires to permit "the use of ordinary process in the instant case" as argued by Appellant, Appellant's Brief at page 7, it must either amend and/or repeal O.C.G.A. § 9-11-81 or, alternatively, modify O.C.G.A. § 9-6-27. Because of O.C.G.A. § 9-11-81, no language contained in the Georgia Civil Practice Act can modify the contradictory mandamus process and procedure set forth in O.C.G.A. § 9-6-27.

II. THE TRIAL COURT CORRECTLY HELD THAT HENRY COUNTY IS ALLOWED TO SPEND THE SPLOST PROCEEDS AT ISSUE ON THE REMAINING UNCOMPLETED SPLOST PROJECTS

A. THE PLAIN LANGUAGE OF THE VERSION OF O.C.G.A. § 48-8-112 APPLICABLE TO THIS CASE EXPRESSLY PERMITTED THE COLLECTION OF THE SPLOST PROCEEDS AT ISSUE IN THIS APPEAL

Appellant argues that the trial court erred because it failed to ascertain and appreciate the "legislative intent" behind the 1994 modifications to the SPLOST statutory framework. Appellant's Brief at page 8. According to Appellant, the General Assembly in 1994 intended to modify O.C.G.A. § 48-

8-112 by eliminating the following language from paragraph (b)(3) of said statute: "If the tax was imposed solely for purposes other than road, street, and bridge purposes" (hereinafter "roads exception language of O.C.G.A. § 48-8-112"). Appellant's Brief at pages 11-13. Appellant argues that the General Assembly failed to expressly eliminate the roads exception language of O.C.G.A. § 48-8-112 in 1994 merely because of a "technical oversight." Appellant's Brief at page 12. Because, according to Appellant, the continued presence of the roads exception language of O.C.G.A. § 48-8-112 created a "conflict" in the SPLOST statutory framework "between 1994 to 1997," Appellant's Brief at page 12, he urges this Court to take the radical step of usurping legislative power by blue-penciling the roads exception language of O.C.G.A. § 48-8-112 retroactive to 1994. Appellant's Brief at page 13. For multiple reasons, Appellant's argument must be rejected.

Appellant's characterization of the General Assembly's failure to eliminate the roads exception language of O.C.G.A. § 48-8-112 as a "technical oversight" is belied by the General Assembly's own actions. In 1995, one year after the General Assembly supposedly committed the "technical oversight" argued by Appellant, it amended O.C.G.A. § 48-8-112 by replacing in its entirety the language appearing in Paragraph (c) of said statute. Ga. L. 1995, p. 172, § 4. However, at that time, the General Assembly left in place the roads exception language of O.C.G.A. § 48-8-112. See id. Because the General Assembly is presumed to possess "full knowledge of the existing condition of the law" when it enacts legislation, Buice v. Dixon, 223 Ga. 645, 647 (1967), the General Assembly's actions and omissions in 1995 relative to O.C.G.A. § 48-8-112 renders unsupportable Appellant's argument that the failure of the General Assembly to strike the roads exception language of O.C.G.A. § 48-8112 in 1994

was the result of a technical oversight. It must necessarily be presumed that in 1995 the General Assembly was fully aware of the presence of the roads exception language of O.C.G.A. § 48-8-112 and consciously decided to preserve that language.

Moreover, the actions of the General Assembly in 1997 eviscerate Appellant's argument that the roads exception language of O.C.G.A. § 48-8-112 was "effectively" eliminated upon the enactment of Ga. L. 1994, p. 1668. Appellant's Brief at pages 13-14. If the intent and effect of Ga. L. 1994, p. 1668, was to eliminate the roads exception language of O.C.G.A. § 48-8-112, the General Assembly would not have expressly eliminated said language in 1997 via Ga. L. 1997, p. 519. The fact that the General Assembly eliminated the roads exception language of O.C.G.A. § 48-8-112 in 1997 is prima facie evidence that the General Assembly did not effect that change in 1994 as argued by Appellant. Jackson v. Shadix, 272 Ga. 631, 634 (2000).

Furthermore, Appellant's argument is infirm because the General Assembly expressly made the elimination of the roads exception language of O.C.G.A. § 48-8-112 prospective in nature, not retroactive as argued by Appellant. Importantly, Ga. L. 1997, p. 519, § 2, states as follows:

> Notwithstanding any provision of Code Section 1-3-4.1 to the contrary, this Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and shall apply with respect to taxes imposed or to be imposed under resolutions or ordinances adopted on or after said effective date.

As the 1997 amendment to O.C.G.A. § 48-8-112 was enacted on April 14, 1997, Ga. L. 1997, p. 520, the

elimination of the roads exception language of O.C.G.A. § 48-8-112 only applies to those Resolutions enacted on or after April 14, 1997. Significantly, the Resolution at issue in this appeal was approved and ratified in 1996, (R. 11 at ¶ 6), and provided for road projects. (R. 18 at ¶¶ 3(a) & 3(b)). Accordingly, despite Appellant's protestations to the contrary, Appellant's Brief at pages 13-14, the Department of Revenue was authorized and obliged to collect SPLOST revenue for the entire five (5) year period enumerated in the Resolution. Failure to do so would have been contrary to the express intention of the General Assembly.

B. THE SHADIX HOLDINGS APPLY TO THIS CASE

Because they are fatal to his argument, Appellant attempts to convince this Court that Jackson v. Shadix, 272 Ga. 631 (2000), and Shadix v. Carroll County, 274 Ga. 560 (2001), are "not relevant or germane to the instant case." Appellant's Brief at page 15. Appellant's argument is based on his erroneous belief that the changes expressly made to O.C.G.A. § 48-8-112 in 1997 via Ga. L. 1997, p. 519, actually became effective in 1994. Appellant's Brief at pages 13-15. Based on this erroneous belief, Appellant contends that Jackson v. Shadix is not relevant because the resolution at issue in that case was enacted prior to 1994. Appellant's Brief at page 15. However, as conclusively established above, the year of significance is 1997, not 1994. Because the 1997 amendment to O.C.G.A. § 48-8-112 only applies to those SPLOST resolutions enacted on or after April 14, 1997, see supra at Part II.A., the resolution at issue in Jackson v. Shadix was governed by the same version of O.C.G.A. § 48-8-112 that controls this case, i.e., the version of O.C.G.A. § 48-8-112 enacted via Ga. L. 1987, p. 1322.

The version of O.C.G.A. § 48-8-112 germane to both Jackson v.Shadix and this matter set forth three (3) possible termination dates for a SPLOST:

> [t]he first was applicable only when the resolution provided for general obligation debt, which was not the case here. The third measure applied only when the tax was imposed "solely for purposes other than road, street and bridge purposes" and was not applicable to the tax here because the tax was imposed in part for road, street, and bridge purposes. The second measure, however, which was not limited by the purpose of the tax or by a requirement for general obligation debt, as the other two measures were, provided for termination of the tax at the end of the period established in the referendum. The unmistakable and unambiguous meaning of those provisions was that a SPLOST that was not limited to purposes other than road, street, and bridge purposes, and that did not provide in its resolution for general obligation debt, was to be measured by the period of time specified in the resolution.

Jackson v. Shadix, 272 Ga. at 633. Accordingly, Jackson v. Shadix and its progeny control and mandate the conclusion that the mixed purpose SPLOST at issue in this matter "was to be measured by the period of time specified" in the Resolution and that all of the funds collected during that five (5) year period can be expended on SPLOST projects.

C. DICKEY v. STOREY SUPPORTS THE TRIAL COURT'S DECISION

Appellant's argument that Dickey v. Storey, 262 Ga. 45 (1992), is not germane to this matter is equally unavailing.

His attempt to distinguish Dickey is based on the superficial fact that the abandonment at issue in that case occurred while the SPLOST was still in effect, not after the expiration of the SPLOST. Appellant's Brief at pages 24-26. Appellant's argument misses the point: whether the abandonment is on the front-end or the back-end of the SPLOST collection period, the governing authority is diverting money that should be used to finish uncompleted SPLOST projects. Waste is waste regardless of its temporal proximity to the termination of the SPLOST.

Under Appellant's theory, the fiduciary duty recognized by this Court in Dickey, 262 Ga. at 454-56, evaporates upon the expiration of the SPLOST. Appellant's Brief at pages 24-26. However, such a duty is neither ephemeral nor transitory. If Appellant prevailed in this matter, the SPLOST proceeds, which were in part raised by non-homeowner residents of the county via the purchase of goods, would be used to exclusively benefit homeowners in Henry County. Appellant's Brief at page 24. In effect, Appellant is seeking a transfer of wealth from those individuals in the lowest socioeconomic strata (non-homeowner county residents) to those individuals in the highest socioeconomic strata (homeowner county residents).

Diverting SPLOST revenues for the exclusive benefit of homeowner residents of the county is the epitome of a breach of the fiduciary duty owed to the public when SPLOST projects that will benefit the whole of the county remain uncompleted.

Because the principles espoused by this Court in Dickey are applicable to this and all cases involving the expenditure of SPLOST revenue, the trial court correctly relied on that

precedent to hold that an abandonment of the uncompleted SPLOST projects would be violative of Dickey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will hereby certify that I, the undersigned, have this day served upon all parties the foregoing **BRIEF OF APPELLEES HENRY COUNTY, GEORGIA, LELAND MADDOX, WARREN HOLDER, GARY FREEDMAN, JASON HARPER, GERRY ADAMS AND LEE HOLMAN** by placing a correctly addressed copy of same in the United States Mail, correct postage affixed thereto, to insure delivery to the following:

James L. Haugen
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This 28th day of July, 2003.

/s/_____
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